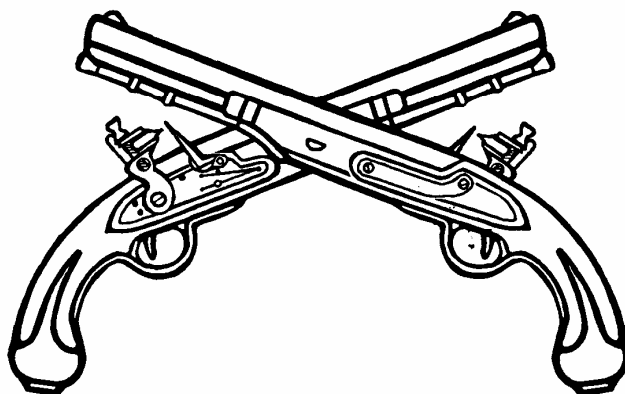


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**CONFESSIONS AND ADMISSIONS**

**MP**



**SETS THE STANDARD FOR EXCELLENCE**

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**THE ARMY INSTITUTE FOR PROFESSIONAL DEVELOPMENT  
ARMY CORRESPONDENCE COURSE PROGRAM**

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## CONFESSIONS AND ADMISSIONS

Subcourse Number MP 1020

EDITION D

United States Army Military Police School  
Fort McClellan, Alabama 36205-5030

4 Credit Hours

Edition Date: April 1996

### SUBCOURSE OVERVIEW

This subcourse examines the law of confessions and admissions. It covers the general principles and applicability of the Fifth and Sixth Amendments to the United States Constitution. It examines the rights of suspects under Article 31, UCMJ, as well as when (and how) those rights are triggered. It also analyzes the procedures for advising a suspect of his rights, how to secure a valid waiver of those rights, and how to handle a nonwaiver. It examines the rules governing line-ups, the application of the exclusionary rule, and the public safety exception to Miranda.

Those who question persons suspected of criminal offenses must be familiar with this area of the law. This is true for criminal investigators, officers, NCOs, etc. The actions of those who interrogate a suspect may drastically affect whether or not the offender can be successfully prosecuted at a court-martial. Without a basic understanding of this area of the law, the result is likely to be unlawfully obtained confessions and evidence which is, therefore, inadmissible at trial. The criminal may go free, then, due to the errors of those who sought to question him. Your understanding of the law in this area will prevent this unfortunate outcome from occurring.

This subcourse will reinforce your basic knowledge and understanding of the law governing confessions and admissions, and will further expand that knowledge. If you have no prior familiarity with this subject, this subcourse will give you a sound working knowledge of the applicable legal principles. You must understand these rules, and how to apply them in the field. To accomplish this end, this subcourse will examine prior court decisions and the facts which faced various criminal investigators, commanders, and NCOs. You will learn from what they did, and from what they sometimes failed to do. The successful completion of this subcourse will help prepare you to assume the added responsibilities of a supervisor over those who are engaged in law enforcement duties. Subordinates, of course, will look to you for guidance. If you do not know the law, you will be unable to provide it.

There are no prerequisites for this subcourse.

This subcourse reflects the doctrine which was current at the time it was prepared. In your own work situation, always refer to the latest official publications.

Unless otherwise states, the masculine gender of singular pronouns is used to refer to both men and women.

TERMINAL LEARNING OBJECTIVE

- ACTION:                    You will have a sound working knowledge and understanding of the law governing confessions and admissions.
- CONDITION:                You will have this subcourse, pencil and paper.
- STANDARD:                To demonstrate competency of this task, you must achieve a minimum of 70 percent on the subcourse examination.

## TABLE OF CONTENTS

Section	Page
Subcourse Overview .....	i
Administrative Instructions .....	v
Grading and Certification Instructions .....	v
Lesson:	
Confessions and Admissions .....	1-1
Part A: Confessions and Admissions .....	1-1
Part B: The Origin of the Procedural Protection .....	1-3
Part C: The Motion to Suppress .....	1-3
Part D: Article 31b .....	1-5
Part E: Who is a Suspect .....	1-8
Part F: The Meaning of "Interrogation" .....	1-11
Part G: What is a "Statement" .....	1-16
Part H: The Concept of "Official" Questioning .....	1-21
Part I: The Right to Counsel .....	1-26
Part J: Advising a Suspect of His Rights .....	1-30
Part K: Interrogation of Civilian Suspects .....	1-37
Part L: Spontaneous Statements .....	1-39
Part M: How to Handle a Nonwaiver .....	1-42
Part N: Presence of Counsel/Right to Counsel .....	1-58
Part O: The Voluntariness Standard .....	1-60
Part P: The Public Safety Exception .....	1-66
Part Q: The Exclusionary Rule .....	1-69
Part R: Line Ups .....	1-76
Part S: Conclusion .....	1-79

Practice Exercise .....	1-80
Answer Key and Feedback .....	1-84

Student Inquiry Sheets

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## LESSON

### CONFESSIONS AND ADMISSIONS

Critical Tasks: 01-3756.00-6001  
191-390-0131  
191-390-0132  
191-390-0133  
191-390-0144

## OVERVIEW

### LESSON DESCRIPTION:

In this lesson you will learn the law governing confessions and admissions. You will be able to properly advise a suspect of his rights and how to obtain a statement from him that will be admissible at a later court-martial.

### TERMINAL LEARNING OBJECTIVE:

ACTION: Using the law governing confessions, obtain a statement from a subject that will be admissible in court.

CONDITION: You will have this subcourse, pencil, and paper.

STANDARD: To demonstrate competency of this task you must achieve a minimum score of 70 percent on the subcourse examination.

REFERENCE: The material contained in this lesson was derived from the following publications: FM 19-20, MCM, AR 190-30, and CIDR 195-1.

## INTRODUCTION

In a criminal case, one must keep in mind the critical importance of the accused's own confession. There is a tendency to sometimes forget this, and to focus instead on the exclusive use of scientific means of criminal detection. Such tools as ballistics, fingerprints, pathology, photography, and serology are, of course, extremely important. A confession, however, presents the accused's own explanation of what he did, how he did it, when, and why.

### PART A - CONFESSIONS AND ADMISSIONS

1. A classic illustration of the importance of a confession is the assassination of President Kennedy on November 22, 1963. The crime, committed in daylight, occurred in the midst of hundreds of spectators, many of whom were police officers. Physical evidence was plentiful, in such forms as

fingerprints, photographs, clothing fibers, ballistics, etc. The Warren Commission, in fact, compiled a 25-volume report dealing with the evidence relating to the crime. Still, more than 20 years later, we cannot state with any degree of certainty exactly what happened that day. The accused assassin was himself shot to death two days after the President's murder. Without a confession, then, history will forever speculate as to whether or not the crime was the act of a lone assassin (as opposed to the result of the conspiracy).

2. A confession may provide something which physical evidence cannot: a motive. A motive is simply the accused's reason for the commission of a crime. Common examples are jealousy, financial gain, and simply hate. While crimes can occur without any apparent motive, it is easier for a trial counsel to obtain a conviction if some motive can be established. Otherwise, there appears to have been no reason for the accused to have committed the crime; he may, therefore, argue at trial that this shows his innocence.

3. As opposed to a confession (which is a complete acknowledgement of guilt), an admission is simply where the accused admits some fact which is then used to connect him with the crime. He may, for example, deny committing the murder, but may admit that the knife that was used is his. He may deny committing the rape, but may admit that he was with the victim on the night in question.

4. Both confessions and admissions are extremely important in terms of establishing the guilt of the perpetrator. Even if the accused denies everything in his statement (makes no confession or admission), his statement is still very important. It enables the trial counsel to discover just what the accused will testify to at trial. Stated differently, it "ties him down" to a story. This is extremely significant to a trial counsel who is preparing for trial. Without any statement of the accused, the trial counsel may not know until the actual trial just what the individual is going to say when he takes the stand.

5. Because confessions and admissions are so important (as are any statements of the person accused of the crime), it is important to understand the applicable law. Unless the statement has been properly obtained, it will not be admissible at trial. This is the result of the exclusionary rule, which we will examine in detail later. For now, it is sufficient to merely mention that the illegally-obtained statement will be inadmissible at trial, along with any other evidence obtained as a result thereof (called derivative evidence).

6. The person who questions the suspect (officer, NCO, or criminal investigator) must have the basic understanding of the applicable rules. This subcourse will provide that. It will examine not simply "the law," but will present actual cases (both federal and military). You will be able to learn from the successes and mistakes of those who came before you. Understand what they did when faced with the sort of factual situations that YOU will face in the field. Read what the appellate courts had to say, as our higher courts (including the U.S. Supreme Court) examined the conduct of the investigator,

officer, or NCO involved in the case. When finished, you will be prepared to question a suspect and obtain a statement that will be admissible in evidence at a trial by court-martial.

#### PART B - THE ORIGIN OF THE PROCEDURAL PROTECTIONS

The Origin of the Procedural Protections. Before examining the specific rights of the accused, we shall take a moment and explain the basic origin of those procedural protections. "The prohibitions of Article 31 and the Fifth Amendment against coerced confessions are based upon the concept that involuntary statements must be excluded because of their inherent potential for unreliability." U.S. v. Lausin, 18 MJ 711 (ACMR, 1984).

1. The Fifth Amendment to the U.S. Constitution simply states: "...nor shall (he) be compelled in any criminal case to be a witness against himself." Article 31, UCMJ, states: "No person subject to this Chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him." Article 31b, UCMJ, more specifically states that "no person subject to this Chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial."

2. Article 31b, then, requires that a suspect be advised of three things: (1) the nature of the accusation; (2) the right to remain silent; and (3) that any statement he makes may be used as evidence against him in a trial by court-martial. As you can see, the right to counsel is not, therefore, found in Article 31. Instead, the right to counsel at an interrogation was recognized by the U.S. Supreme Court in its decision in Miranda v. Arizona, 384 U.S. 436 16LEd2d694 86 SCT 1602 (1966). Miranda was adopted by the military in U.S. v. Tempia, 37 CMR 249 (1967). In Tempia the U.S. Court of Military Appeals ruled that Miranda "lays down concrete rules which are to govern all criminal interrogations by federal or state authorities, military or civilian, if resulting statements are to be used in trials commencing on or after June 13, 1966." The military, then, adopted the Miranda requirements as a constitutional requirement. U.S. v. Clark, 48 CMR 77, (CMA, 1973).

3. We will return to the specific rights covered by both Article 31, UCMJ, and the right to counsel. For now, understand that the right to counsel is not contained in Article 31. It is, nonetheless, a basic right of the accused that must be both understood and observed.

#### PART C - THE MOTION TO SUPPRESS -- LITIGATING THE ISSUE AT TRIAL

The Motion to Suppress -- Litigating the Issue at Trial. We will examine the exclusionary rule itself later. For now, understand that if a confession is unlawfully obtained, the accused may successfully move to have it excluded from court. In other words, he will try to have it suppressed, or kept out of

the trial. If he is successful, this will obviously improve his chances of being found not guilty.

1. At the court-martial, before the accused enters a plea (guilty or not guilty), the accused may raise any motions that he may have. This is done at the portion of the trial called the Article 39A Session. This is, again, the time for the raising of pretrial motions (Military Rules of Evidence 304(d)2). The law defines a statement as being involuntary "if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement" (MRE 314(c)3). Also, Article 31d, UCMJ, states that "no statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement, may be received in evidence against him in trial by court-martial."

2. Once the accused has made his motion to suppress, "the prosecutor has the burden of establishing the admissibility of the evidence" (MRE 304(d)5). The defense may present evidence and the accused may testify on the motion. The military judge must then find the statement to have been made voluntarily before it may be accepted into evidence. Frequently, what is involved is an oral confession. This is one that has not been reduced to writing. It is valid and admissible (the same as a written confession) and "may be proved by the testimony of anyone who heard the accused make it" (MRE 304(b)1). Consequently, whoever questioned the suspect will most likely be a witness at the court-martial. As a matter-of-fact, this person will quite likely be the only witness who can testify for the government as to how the statement was obtained. Indeed, the accused and the questioner may have been the only persons present when the statement was made. Unless the questioner can testify credibly that he followed the applicable rules, the confession will not be accepted into evidence. Unless you know the basics of what these rules are, then, the government's position at trial may be severely handicapped.

3. If the military judge finds the confession to have been legally obtained and, therefore, admissible, he will then instruct the court members "to give such weight to the statement as it deserves under all the circumstances." The defense may still argue to the court members that the statement is unworthy of being believed (MRE 304(e)2). After the Article 39A Session is over, the witness may find himself testifying again as to the circumstances surrounding the taking of the statement. The U.S. Supreme Court held that even if a defendant was unsuccessful in moving to suppress his confession, he may still argue to the jury that it is unreliable. He has a constitutional right to present such evidence. In fact, his case "may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility." Crane v. Kentucky, 476US683, 90LEd2d 636, 106SCT 2142 (1986).

4. It should be apparent that the issue of the admissibility/voluntariness of the statement is a critical issue at the court-martial. If those who question suspects are not familiar with the applicable legal rules, the result can be a disaster. The confession may be inadmissible, and the offender may escape

conviction and punishment for his crimes. The errors of the criminal investigator, officer, or NCO, may wind up providing an unnecessary (and undeserved) windfall to the accused. Avoiding conviction, he may return to the community to commit more crimes. That community, of course, is our community. It is to the avoidance of such an unfortunate outcome that this subcourse is directed.

#### PART D - ARTICLE 31b: THE NATURE OF THE ACCUSATION

Article 31b: The Nature of the Accusation. Article 31b, UCMJ, as we have seen, requires that a suspect be advised of three things. Notice of the right to remain silent and that any statement made may be used against him in a trial by court-martial are fairly straight-forward. Notice regarding the "nature of the accusation," however, has produced some confusion and litigation. It is important, therefore, to take a close look at just what this means.

1. Prior to questioning, "all military suspects or accused persons must be given a proper warning of their rights in accordance with Article 31, UCMJ (AR 195-2, paragraph 3-18). The three warnings required by Article 31b are also stated at RCM 305c.

2. In one case, an investigator apprehended the accused for AWOL, and also suspected him of stealing a car. The investigator, however, did not tell the accused that he suspected him of the theft, but simply said "that I was interested in his activities over a period of time from the 29th of October until the 31st, inasmuch as I was interested in what his activities were from the time he departed the base until he was apprehended." The investigator admitted that he knew the taking of a car was a "separate and distinct" offense from the AWOL, but said he felt that the general inquiry into the accused's behavior during the absence was sufficient advice regarding the larceny offense. On appeal, the court held that this advice was clearly insufficient. The investigator believed the accused had stolen the car and questioned him about it, but failed to advise him of the nature of the accusation. This had the effect of depriving the suspect "of any meaningful choice concerning whether to speak or remain silent." U.S. v. Reynolds, 37 CMR (CMA, 1966).

3. The court explained that simply drawing the suspect's attention to a general period of time, and having him discuss all of his activities, is not enough. The purpose of the requirement "seems clearly to have been designed so to orient an accused or suspect as to allow intelligently to weigh the consequences of responding to an investigator's inquiries." It "is not necessary to spell out the details of the accused's alleged misconduct with technical nicety in order to adequately inform him of the nature of the charge being investigated... It suffices if the accused is made aware of the general nature of the allegations involved." Stated another way, the law does not expect a police officer to use the precision of an attorney in informing the suspect of the subject matter of the investigation. The requirement is only that the suspect be advised of the NATURE of the accusation, "not that it be spelled out with the particularity of a legally sufficient specification." It

would, then, have been sufficient to have drawn the suspect's attention to the taking of the automobile, without reference to the technical terms "larceny" or "wrongful appropriation." The court concluded that "it is obvious that asking an accused what he has done over a three-day period does not inform him of the nature of the accusation which is being investigated."

4. Remember, the purpose of this requirement "is to orient him about the accusation so he can intelligently refuse to answer any question concerning it." U.S. v. Johnson, 19 CMR 91 (CMA, 1955). The warning "must include the area of suspicion and sufficiently orient the accused toward the circumstances surrounding the event." U.S. v. Heulsman, 27 MJ 511 (ACMR 1988). In another case, the accused was suspected of the offense of assault with the intent to commit rape. The accused had abducted the victim in a vehicle, which he had wrongfully taken. The investigator advised the suspect that he was suspected of the assault offense, but did not mention the offense of wrongful appropriation of the vehicle. The court explained that "prior to the time the accused made his statement, the investigator did not know of the second offense." It, therefore, concluded: "It is not always possible to know all of the offenses which might be involved from a given state of facts, but it is necessary that one suspected of a crime know generally the subject of the inquiry. This puts him on notice of the purpose of the questioning... Here, without compulsion of any kind, he related his version of the assault and extended his statement to include the misappropriation. The knowledge of that offense was gained from the accused's statement, and the failure of the investigator to anticipate it and warn the accused is immaterial to the admission of the statement." U.S. v. O'Brien, 12 CMR 81 (CMA, 1953). Remember, "if the examiner is without knowledge or suspicion that a particular offense has been committed by the person to be questioned, he cannot provide the preliminary advice required by Article 31." U.S. v. Davis, 24 CMR 6 (CMA, 1957).

5. U.S. v. Rice, 29 CMR 340 (CMA, 1960), involved a scheme in which a finance clerk deliberately overpaid another individual. The investigator advised the suspect that he was "investigating unauthorized payments of pay and allowances." The court held that the purpose of the advice "is to orient him to the transaction or incident in which he is allegedly involved," and that the accused here "knew the nature of the transaction" even though the investigator did not use the technical term "larceny."

6. U.S. v. Perry, 46 CMR 636 (ACMR, 1972), the accused was suspected of detonating a claymore mine in the NCO billets. The suspect was told that he was suspected of the offense of "aggravated assault," but not attempted murder. The investigator claimed that he honestly thought that aggravated assault was the proper charge. The accused, however, argued that he was not sufficiently advised of the nature of the accusation against him. The court ruled that the investigator may have "understated the potential gravity" of the offense, but that this did not violate Article 31. The reason was that the accused "knew precisely" what was being investigated -- the detonation of the mine in the billets. An investigator must not, however, deliberately and in bad faith understate the offense under investigation, as this could result in suppression of the confession.

7. This is similar to what happened in U.S. v. Davis, 24 CMR 6 (CMA, 1957). The accused was suspected of desertion, but the investigator referred to his activities "from the time he went AWOL." The court explained that the advice regarding the nature of the accusation "need not be spelled out with the particularity of a legally sufficient specification; it is enough if, from what is said and done, that the accused knows the general nature of the charge." Here, then, "the accused was clearly oriented" to the desertion offense. The standard is that the questioner's advice "should illuminate the nature of the suspected offense with such certainty as the information known to the agent permits." Again, this only requires that the suspect be "oriented by his interrogator as to the incident under inquiry." U.S. v. Nitschke, 31 CMR 75 (CMA, 1961).

8. Contrast the above with U.S. v. Johnson, 43 CMR 160 (CMA, 1971). There, the accused left his unit in South Vietnam and proceeded into Laos. He was charged with attempting to contact the Viet Cong for the purpose of discussing the subject of their moral responsibilities to God and their fellow men. When questioned, however, the investigator only advised him that he was suspected of desertion, and not of intentionally attempting to hold intercourse with the enemy under Article 104, UCMJ. The court held that the investigator knew of the facts and did, in fact, suspect the accused of this offense. It also concluded that when someone is suspected of attempted intercourse with the enemy, warning him that he is suspected of desertion is not sufficient. The investigator was not required to know the precise article of the UCMJ that was involved. Again, it is sufficient "if the accused is made aware of the general nature of the allegations involved." In this case, it would have been sufficient to have drawn the suspect's attention to contacting the enemy, without reference to the technical term of "holding intercourse with the enemy."

9. As you can see, an accused is frequently suspected of more than one offense. Such was the case in U.S. v. Quintana, 5 MJ 484 (CMA, 1978). The accused was informed that he was suspected of the offense of larceny of a ship's store funds. The investigator, however, also suspected the accused of having earlier committed the offense of wrongful appropriation from the same funds. The court held, however, that the advice "clearly oriented him to the fact that misuse of the ship's store fund was the object of the investigation. The appellant's disclosure of incidents of misuse over more than that mentioned by the agent was within the frame of reference."

10. Contrast the above with U.S. v. Willeford, 5 MJ 634 (AFCMR, 1978). The accused was suspected of rape. This was held to be sufficient to also orient him to the "closely related" offenses of unlawful entry and indecent acts with the victim. The agent did not, however, advise him that he was also suspected of housebreaking and indecent exposure involving a second, unrelated, victim. The court, therefore, concluded that the advice concerning the first incident was not sufficient to orient the accused to the second incident. Before questioning the accused regarding this second incident, then, the agent should have advised him that he was suspected of the additional offenses.

11. Similarly, in U.S. v. Stamats, 45 CMR 765 (MCMR, 1971), the accused was advised that he was suspected of the offense of murder. The accused was also tried, however, for felony murder and robbery. The court concluded that advice regarding the offense of murder was sufficient. The murder had occurred during the course of the robbery; thus, these were not "separate transactions." Instead, they formed "one continuous sequence." Remember, the requirement is that the advice given "must, at the very least, serve to communicate in general terms the area of suspicion." U.S. v. Gilliard, 42 CMR 1030 (AFCMR, 1970).

12. The requirement to advise a suspect of the nature of the accusation against him is found in Article 31, UCMJ. This was not a requirement announced in the Miranda decision of the U.S. Supreme Court. In Colorado v. Spring, 479US564, 93LEd2d 954, 107 SCT 851 (1987), the Supreme Court ruled Miranda itself does not require that a suspect be informed of the offenses under investigation. In the context of a civilian investigation, then, this decision is applicable. It does not mean, however, that Article 31 has in anyway been overruled. The requirement found in Article 31 is not affected by the Supreme Court decision just cited, since that decision was not dealing with Article 31's requirement at all. This is simply a situation where the soldier is given a procedural protection beyond what is minimally required by the Constitution. Persons subject to the UCMJ (and those acting as their agents) must continue to follow the requirement found in Article 31.

#### PART E - WHO IS A SUSPECT?

Who is a Suspect? The individual is to be warned of his/her rights when the questioner suspects him/her of an offense. The courts have held that "an incriminating statement made in response to a question not asked for the purposes of crime detection or with intent to aid such an investigation, directed to one who is neither accused nor suspected of an offense, is not rendered inadmissible by the lack of prior warning." U.S. v. Hopkins, 22 CMR 309 (CMA, 1957). At the same time, however, "once military law enforcement authorities engaged in an official investigation of crime have identified a suspect from whom they desire any sort of oral or written statement touching the subject matter of the investigation, they must, before proceeding with the investigation, provide the warning demanded by Article 31 -- if his statement is to be usable against him." U.S. v. Taylor, 17 CMR 178 (CMA, 1954).

1. An investigator, then, need not advise a person of his rights when that person is only a "material witness," and not a suspect. U.S. v. Schafer, 32 CMR 83 (CMA, 1962). The investigator, however, must be able to testify that he honestly and reasonably did not suspect the accused. The court will disbelieve testimony that it finds "incredible." U.S. v. Doyle, 26 CMR 82 (CMA, 1958). The mere fact that an investigator says he did not suspect the accused is not conclusive; the court will closely examine the facts.

2. In one case, the accused and the victim were posted as security guards at an Air Force installation's gate. At 1245 hours, the accused telephoned headquarters, stated that he had shot the other guard, and asked for an ambulance. Sergeant Holt was sent to the scene to investigate. He was not a

criminal investigator, but was acting as a "flight commander." When he arrived at the gate, he found the accused "walking up and down on the south side of the gate." The victim was laying on the ground. Sergeant Holt asked the accused what had happened and the response was: "I don't know what happened, Sarge. I told him I was going to shoot him. I pulled my weapon and shot him."

3. Although Sergeant Holt testified that he did not suspect the accused of anything, the court noted that "there are factors which could fairly lead" to another conclusion. As an example, he was "on notice that the accused was responsible for shooting his fellow guard." Under these facts, the conviction was reversed on appeal. U.S. v. Gorke, 31 CMR 210 (CMA, 1962).

4. In a similar case, a military police sergeant, while on shore patrol received notice of a shooting in the 503d Battalion area. He went to that location and observed a group of soldiers standing around a fire. Another MP at the scene "pointed out appellants as the persons identified to him by a group of Koreans as the men who had shot their countryman." The sergeant approached the group and, looking directly at these men, asked who had done the shooting. They then admitted that they had done it. The court found Article 31 to be "plain and unequivocal," and held the individuals to have been suspects. The failure to advise them of their Article 31 rights, then, was error. U.S. v. Wilson, 8 CMR (CMA, 1953).

5. Contrast the above with U.S. v. Henry, 44 CMR 152 (CMA, 1971). There, CPT Fleming was the acting executive officer of the 4th Battalion, 21st Infantry, on duty in South Vietnam. On the night in question, at approximately 2130 hours, shots were heard. CPT Fleming and another officer thought the shots had come from "interdiction fire from their perimeter." Since the shots sounded "a little close," they decided to investigate. At this point, they heard other shots. Thinking these were "incoming," they grabbed their weapons and "started out the back door to see what was going on." As CPT Fleming came out of his hut, someone told him that "someone had been shot." CPT Fleming then realized that the shots had come from within the compound.

6. CPT Fleming saw a group of 8 to 10 persons gathered outside the rear of a hootch. As he approached, CPT Fleming observed that there were several conversations going on. From "all sorts of comments," he determined that "it was evidence that someone had done some shooting and one of the drivers had been hit." He testified that he had no idea of just how the incident occurred, and that he wanted to find out who was hurt, where any victims were, and who had done the shooting. Speaking to the group, he asked "who shot who?" The accused was in the group, about 10 feet from CPT Fleming and "on the far side." The court explained that "information available to the investigator may so clearly identify the conduct as criminal and a person as the wrongdoer as to require threshold advice to the individual regarding his right to remain silent; in other instances, the investigator may have no reason to anticipate or suspect that a person from whom he seeks information is implicated in a crime. Thus, the conclusion as to criminality of suspicion in a particular case depends on the totality of the surrounding circumstances."

7. The court distinguished the facts in the Wilson case (discussed above). There, the MP had received a report that the individuals "had done the shooting." His question was aimed directly at the suspects. Here, however, CPT Fleming "did not suspect the accused of shooting and did not expect him to reply to his question." In fact, he did not suspect any member of the group he directed his question to; he had, in effect, "no suspect at all." The court held that "no particular person was suspected by Fleming at this point. Since Fleming suspected none of the group of being involved in the shooting and had no information that reasonably should have put him on notice, he did not need to give preliminary advice as to the right to remain silent."

8. In U.S. v. Collier, 49 CMR 723 (AFCMR, 1975), at approximately 0930 hours, a black male entered an Air Force base hospital and opened fire on assigned personnel within. A witness described the assailant and the fact that he had left "in a blue and white automobile driven by a black female companion." When the accused was questioned by the OSI, the agents knew the following: (1) there had been a shooting at the hospital; (2) the accused had been at the hospital shortly before the shooting. He had entered the emergency room entrance with a black female, after getting out from a blue and white automobile. He was then paged, but could not be located. His records had been removed from the files indicating he was to be seen; (3) his general description fit that of the assailant; (4) the assailant left the hospital in a blue and white automobile; (5) the accused owned a blue and white automobile which the eyewitness said "looked like the one he had seen;" and (6) of all the persons who visited the hospital that morning, the accused was the only one with a vehicle known to fit the description.

9. Faced with these facts, the court explained that whether or not someone is a suspect depends "on the facts known to the investigator... If the interviewer, based upon consideration of all known surrounding circumstances, has reasonable grounds to suspect that the person being interrogated has committed an offense, a proper threshold warning must be given." Here, the court concluded that the agent "had reasonable cause to believe the accused had committed the crime under investigation." The agent's testimony to the contrary (that he did not suspect the accused, and that the accused was a mere witness) was not convincing, since "the surrounding circumstances simply do not support this." Such testimony was rejected "as unwarranted by the known circumstances and plain common sense."

10. In another case, an MP had the individual placed under apprehension. Under these facts, the court held that "he must have had probable cause to believe" that the person had committed the crime. U.S. v. Wagner, 39 CMR 216 (CMA, 1969). Remember, the issue "depends, in each case, upon the facts known to the investigator and the totality of the circumstances. If there are reasonable grounds to suspect that the person being questioned has committed an offense, the warning must be given." The testimony of the questioner that he did not suspect the individual is not conclusive. U.S. v. Tibbetts, 1 MJ 1024 (NCMR, 1976). If the investigator's testimony that he did NOT suspect the individual is found to be unreasonable, the court will conclude that he SHOULD have suspected the individual and that he was, therefore, required to advise him of his rights. U.S. v. Anglin, 40 CMR 232 (CMA, 1969).

11. A final example of this rule is U.S. v. Lacy, 16 MJ 777 (ACMR, 1983). A CID agent was told by medical personnel at the Nuernberg Army Hospital that the accused's 11-week-old daughter had died of head injuries which she had sustained earlier that day. The agent was told that the father (the accused) had brought the child in for treatment, saying she had fallen "from a couch onto a hard floor after he had left her unattended." The agent concluded that "we might have something more than an accidental death." CID subsequently learned that the child's injuries "included scratches and bruises of the body, a bruise over one eye and three bruises of the skull." A pathologist told the investigator of a medical study of 300 infants who had fallen from a height of three feet or less. None had even needed hospitalization. CID then requested that necessary action be taken to preserve the body, and took action to seize the couch. The accused was subsequently questioned without having been informed of his rights.

12. The court, faced with these facts, held that "there was more than ample evidence" to focus the agent's attention on the accused. The facts "should have compelled the conclusion that accidental death was improbable." The agent's actions to preserve the body and seize the couch "reflect his recognition of appellant as a suspect. Therefore, he should have given appellant the required warning." This is simply another example of a situation where the interrogator "believed or reasonably should have believed that the one interrogated committed an offense." U.S. v. Morris, 13 MJ 297 (CMA, 1982).

13. It is, of course, possible for an individual not to be a suspect at the start of an interview. Something he says or does during the interview may change his status. He may contradict himself, make a proverbial "slip of the tongue," etc. If the facts make the individual a suspect at some point during the interview, then Article 31 is triggered and the interviewer must stop and advise the person of his rights. U.S. v. Rice, 3 MJ 1094 (NCMR, 1977). As we have seen, the one doing the questioning cannot blindly ignore the facts and simply claim that he did not suspect the individual of anything.

#### PART F- THE MEANING OF "INTERROGATION"

The Meaning of "Interrogation." Article 31b, UCMJ, states that "no one subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense... without first advising the individual of his rights." The term "interrogate" normally involves questions put to the suspect.

Military Rule of Evidence 305 states, "'Interrogation' includes any formal or informal questioning in which an incriminating response is either sought or is a reasonable consequence of such questioning." Further, this definition is "broad enough" to include conversations or actions which could reasonably be expected to elicit a response which would be considered the equivalent of formal questioning.

1. An example of a conversation reasonably expected to elicit a response arose in Brewer v. Williams, 430 U.S. 387, 51 L.Ed. 2d 424, 97 S.Ct. 1232

(1977), a U.S. Supreme Court decision. A ten year old girl disappeared at the Des Moines, Iowa, YMCA while watching her brother in a wrestling tournament on Christmas Eve. A teenaged witness later told police that Mr. Williams, a mental patient and a resident of the YMCA, had taken a bundle wrapped in a blanket from the YMCA about the time the girl disappeared. When Mr. Williams placed this bundle in the back seat of his car, the witness noticed two white skinny legs protruding from the blanket. Mr. Williams immediately became the subject of a police manhunt. The day after Christmas, after consulting with a lawyer, he agreed to turn himself in to police. Two Des Moines detectives were dispatched about 160 miles away to pick up Mr. Williams. At that time the girl's body had not been discovered. With Mr. Williams in the detectives' vehicle, one of the detectives who knew him to be a religious man said to him, "Reverend,

"I want to give you something to think about while we are traveling down the road... Number one, I want you to observe the weather conditions, it is raining, it is sleeting, it is freezing, driving is very treacherous, visibility is poor, it is going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it, you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snowstorm and possibly not being able to find it at all."

2. The suspect thought about it for awhile, and then directed the police to the body. On appeal, he argued that he had been interrogated in violation of his rights. The U.S. Supreme Court held that "there can be no serious doubt... that Detective Leaming deliberately set out to elicit information from Williams just as surely as -- and perhaps more effectively -- than if he had formally interrogated him... he purposely sought... to obtain as much incriminating information as possible." The detective, then, had used psychology "with the specific intent to elicit incriminating statements." The conviction was reversed.

3. A similar issue arose in Rhode Island v. Innis, 64 L.Ed.2d 297 (1980). There, a suspect was arrested for the shotgun slaying of a taxicab driver. The suspect was placed in a police vehicle and was driven back to headquarters in the company of three police officers. While en route, one of the officers said to another officer:

"I frequent this area while on patrol, and because a school for handicapped children is located nearby, there is a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves."

4. The other officer agreed "that it was a safety factor, and that we should, you know, continue to search for the weapon and try to find it." The suspect then interrupted the officers and told them to turn the car around. He stated that he "wanted to get the gun out of the way because of the kids in the area of the school." On appeal, the issue was whether or not the suspect had been interrogated. The Supreme Court explained that Miranda had referred to "questioning" of the suspect. The term "interrogation," however, extended to more than that. It included "techniques of persuasion, no less than express questioning." The court then concluded that the term extended to "either express questioning or its functional equivalent." In other words, it covers not merely "express questioning, but also... any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect... A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation."

5. The court noted, however, that it was not holding that all statements obtained by the police after a person has been taken into custody are automatically to be considered the product of interrogation. It explained that "since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." In such cases, the intent of the police officers is important, "for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect."

6. Under the facts presented, the court held that there had been no interrogation. It could not be said that the two officers should have known that their brief conversation was reasonably likely to elicit an incriminating response from the suspect. Their remarks were not designed to provoke a response from the suspect, and there was no reason for them to have known that their "few offhand remarks" would have produced any such response. The issue, then, is whether or not the suspect's response was "the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response." Here, the testimony of the police officers was critical in convincing the court that they acted in good faith, and hadn't intended to induce the suspect to make a statement.

7. Another example of this problem is *People v. Ferro*, 472 NE2d 13 (NY, 1984). The defendant had been arrested for the murder of a woman during the course of a robbery in which some furs were stolen from her home. The defendant was in a cell in the police station. A detective left the police station and returned with the stolen furs, which he then stacked in front of the cell, a foot away from the suspect. The officer said nothing, but simply stared at the suspect who, after a few minutes, confessed. On appeal, the court held that the detective should have known that his actions were

"reasonably likely to elicit from the defendant an incriminating response." In fact, where "the only possible object of the police action in revealing evidence to a defendant is to elicit a statement from him, it does no violence to logic to conclude that the police should have known that it would do so." In other words, under these facts, it was not only "reasonably likely" to elicit an incriminating response; it was DESIGNED to do so.

8. The issue went before the U.S. Supreme Court again in Arizona v. Mauro, 481US 520, 95LEd2d 458, 107Sct 1931 (1987). The suspect had been arrested for the murder of his male child. At the police station, he was questioned by the police. When he said he wanted a lawyer, the questioning was immediately stopped. Meanwhile, another detective was questioning the suspect's wife, and she said that she wanted to speak with her husband. The detective was reluctant to allow her to do so, but she insisted on it. The detective checked with his supervisor, who told him to go ahead and allow the meeting if the wife really wanted it (which she did). The detective, however, was told not to leave the husband alone with his wife. The detective then told both the suspect and his wife that they could speak together, but only if a police officer was present in the room. They agreed to this, and the meeting took place. Statements that the suspect made were later introduced against him at trial, as the government tried to show that he was sane at the time he committed the crime. The defendant, on the other hand, argued that he had been illegally interrogated by the police in violation of Miranda, and moved to suppress all of his statements.

9. The court held that Mauro had not been interrogated. The detective who was present in the room asked the suspect no questions. Also, there was no evidence that the decision to allow the suspect's wife to visit him was a psychological ploy that was the functional equivalent of interrogation. Clearly, the police did not send the wife in for the purpose of eliciting incriminating statements from her husband. On the contrary, the police tried to discourage her from even talking to her husband, but finally "yielded to her insistent demands." The court concluded that the police "need not adopt inflexible rules barring suspects from speaking with their spouses, nor must they ignore legitimate security concerns by allowing spouses to meet in private. In short, the officers in this case acted reasonably and lawfully by allowing Mrs. Mauro to speak with her husband."

10. In U.S. v. Peyton, 10 MJ 387 (CMA, 1981), the accused had been apprehended by a military police investigator. When advised of his rights, the accused said that he wanted a lawyer, so the interview was immediately terminated. The investigator, however, allowed the suspect to remain in his office while he completed CID Form 44, "which is a personal data card that the CID requires an agent or investigator to complete after interviewing a suspect." The investigator simply filled out the form, which did not call for the suspect to answer any questions or supply any information. As the investigator was completing the form, however, the suspect started to converse with him regarding "how serious of an incident this was," and made incriminating statements.

11. The court held that there was no evidence that the government had deliberately and designedly set out to elicit incriminating information from the suspect. The completion of the personal data card "was only a circumstance that is normally attendant to arrest and custody... There is no evidence that this procedure, or any other words or actions on the part of the investigators, persuaded (the suspect) to confess."

12. Compare these facts with U.S. v. Muldoon, 10 MJ 254 (CMA, 1981). When questioned by the CID, the accused said he wanted a lawyer. The interview was then stopped, and the suspect was placed in a detention cell. The CID then interviewed some other suspects, one of whom confessed and implicated the accused. Armed with this information, the CID agents went to the accused and told him that his friend had confessed and implicated him. Following this revelation, the accused himself confessed. The investigators candidly admitted that "this was designed to see if he would talk." They admitted that it was "part of a technique to use in any interview in telling them of the uselessness of their situation. In other words, that they had been caught."

13. The court agreed with this assessment, and held that the investigators had used a "time-honored technique to elicit a statement -- namely, informing the suspect that he had been implicated by someone else. Here, the agents candidly admitted that (it) was one of their interrogation techniques." The conviction was reversed. Indeed, "when conversation is designed to elicit a response from a suspect, it is interrogation, regardless of the subtlety of the approach." U.S. v. Borodzik, 44 CMR 149 (CMA, 1971).

14. In another case, when the suspect said that he did not want to be questioned, the CID agent returned him to his cell. About 9 hours later, the agent returned, and told the suspect that another participant in the robbery had given the police a statement that implicated the suspect. Again, such police conduct was deemed to be a form of interrogation. U.S. v. Hill, 5 MJ 114 (CMA, 1978).

15. An interesting application of this rule is U.S. v. Dowell, 10 MJ 36 (CMA, 1980). There, the accused was in pretrial confinement, and was visited by his commander. The commander told the accused of an additional charge against him. The court concluded that it was reasonably foreseeable that this would provoke a response from the subject. The actions of the commander, then, were the "functional equivalent" of interrogation. As the court explained, it was "human nature... that one who has been notified of serious charges against him will feel a need to say something in response to those charges. The foreseeability of such a reaction is all the greater when the accused is in confinement and the charges against him are being presented to him by his commander." The court then concluded:

"When one takes action which foreseeably will induce the making of a statement and a statement does result, we conclude that the statement had been "obtained" for purposes of Article 31... We need not question the good faith of CPT Black, who had a specific duty to inform the accused of the charges against him... However, since the acts involved in performing that

duty had the natural tendency to induce the making of a statement by appellant, the warning requirement of Article 31b... was applicable."

16. In U.S. v. Holliday, 24 MJ 686 (ACMR, 1987), the accused said he wanted a lawyer when the CID agent advised him of his rights. Following this, the agent did not ask him any further questions, but did require the suspect to provide a handwriting exemplar. The court explained that since the suspect had invoked his rights, it would have been improper to have continued to interrogate him. The issue, however, was whether or not the suspect had, in fact, been subjected to further interrogation. The court held that the compelled production of a handwriting sample "does not violate the Fifth Amendment." The agent asked the suspect no further questions, and the situation "was not a subterfuge to place the appellant in a coercive interrogation environment that was likely to undermine the appellant's previous invocation of his rights. It was not the "functional equivalent" of interrogation. The same is true for asking a suspect for his consent to a search. U.S. v. Roa, 24 MJ 297 (CMA, 1987).

17. In U.S. v. Byers, 26 MJ 132 (CMA 1988), a CID agent advised a suspect of his rights. Before doing so, however, he did the following:

"I told him that I would be talking to him today about narcotics. I told him that at this point I would not like for him to make any statement, but rather to listen to what I had to say. From there I told him that he would have several options available to him, one was to face the issue at hand, which was that he had a positive drug urinalysis and I would be questioning him about that, and it was perfectly clear, and there was no doubt in my mind that he had used marijuana, but he would have to face the situation by cooperating with the government in the form of making a full admission and possibly providing a signed, sworn statement, or he had the option of leaving the interview at any time."

18. The court held that a 20 to 40 minute "lecture" constituted the equivalent of interrogation. The rights advisement "should be given when an interrogation begins -- not at its midpoint."

#### PART G - WHAT IS A "STATEMENT"?

What is a "Statement"? Article 31b, UCMJ, you will recall, states that no person subject to this chapter (UCMJ) "may interrogate or request any statement from an accused or a person suspected of an offense" without first informing him of his rights. We have already examined the definitions of "suspect" and "interrogate." The next question concerns the definition of what a "statement" is.

1. Physical acts. In Holt v. U.S., 218 U.S. 1021 (1910), the accused was made to try on a blouse. A witness then testified that it fit the accused. The Supreme Court held that the Fifth Amendment privilege against compelled self-incrimination "is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." This situation, then, was compared to

having a jury look at a prisoner and compare his physical features with those in a photograph. There was, then, no violation of the Fifth Amendment.

a. The analogy of having a jury look at a suspect was a prophetic one. Years later, the issue surfaced in U.S. v. Cain, 5 MJ 844 (ACMR, 1979). The robbery victim testified that the robber "had a gold tooth on his right front, about right here, with a star on it." During the trial, the accused was forced to stand and open his mouth in front of the jury. The court held that the privilege against self-incrimination "allows the compulsion of such acts as taking fingerprints, placing a foot in a footprint, physical examination of the accused's body for scars... or (trying) on a garment." Those cases "were found not to require active participation and affirmative conduct in the production of incriminating evidence." The court concluded that an accused could be compelled "to submit to a dental examination for comparison of a tooth fragment found at the crime scene... the passive submission of the accused's body to a physical examination simply does not constitute a 'statement' within the meaning of Article 31." A defendant, then, "has no maintainable privilege against being required, as in the case before us, to stand, or to remove his toupee (wig) for identification purposes. We, therefore, hold that the act of showing a tooth to the court is not an incriminating communication within the meaning of Article 31, UCMJ."

The Supreme Court addressed the admissibility of videotapes of drunk driving suspects in Pennsylvania v. Muniz, 496 US 582, 110 LEd2d 528, 110 SCT 2638 (1990). Over the accused's objections, the videotape of his attempts to complete physical sobriety tests and his answers to police questions was admitted at trial. In plurality opinion, the Muniz court held that the physical appearance of the accused was nontestimonial. The Court also found that his answers to most of the police officer's questions -- while not preceded by Miranda warnings -- were admissible as responses to routine booking questions -- not questions designed to elicit an incriminating response.

b. In another similar situation, the government took impressions of the accused's teeth. The court found this to be "neither testimonial nor communicative in nature." In other words, the mere demonstration of the accused's body (including the taking of dental impressions) "is simply a form of obtaining real or physical evidence." Again, the government's action was upheld. U.S. v. Martin, 9 MJ 731 (NCMR, 1979).

2. Line-ups. In U.S. v. Wade, 18 L.Ed.2d 1149 (1967), the Supreme Court held that the appearance of a suspect in a line-up did not violate his privilege against self-incrimination. The privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature." The court explained that "compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have." As for speaking words in the line-up, the court ruled:

"Similarly, compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt... (the privilege) offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture... None of these activities becomes testimonial within the scope of the privilege because required of the accused in a pretrial line-up."

3. Handwriting. In Gilbert v. California, 388 US 263, L.Ed.2d 1178 7Sct 1951 (1967), an accused was arrested for a series of robberies in which the robber used a handwritten note demanding money. The Supreme Court Ruled:

"The taking of the exemplars (handwriting samples) did not violate petitioner's Fifth Amendment privilege against self-incrimination. The privilege reaches only compulsion of an accused's communications... and the compulsion of responses which are also communications... and not compulsion which makes a suspect or accused the source of real or physical evidence... One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the coverage of the privilege. A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection."

In U.S. v. Lloyd, 10 MJ 172 (CMA, 1981), the accused was suspected of having committed ration control violations by having purchased more goods than he was authorized to buy. As part of the investigation, an MPI investigator had the suspect produce his identification card, so that the signature could be compared with that used in connection with the various purchases of controlled merchandise. The court held that "handwriting and voice exemplars are not protected by the privilege against self-incrimination." The identification card, of course, was being obtained "for use as a handwriting exemplar." Consequently, "there is no reason to require an Article 31 warning before requesting a suspect to give a handwriting sample or, as here, to produce a document containing his signature or handwriting to be used for comparison purposes." The same result followed in U.S. v. Holliday, 24 MJ 686 (ACMR, 1987), in which the court held that "the compelled productions of a handwriting exemplar, even in an incriminating style uncharacteristic of the accused, does not violate the Fifth Amendment."

4. Body fluids. Schmerber v. California, 38US757, 16 L.Ed.2d 908, 86Sct 1826 (1966), involved a suspect who was under arrest for driving under the influence of intoxicating liquor. While at the hospital for treatment of injuries which he had sustained, a blood sample was withdrawn by a physician. The court ruled that the Fifth Amendment privilege "reaches an accused's communications." It is "a bar against compelling communications or testimony, but that compulsion which makes a suspect or accused the source of real or physical evidence does not violate it." Under the facts of this case, then,

"not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds."

The military courts dealt with this same issue in U.S. v. Armstrong, 9 MJ 374 (CMA, 1980). Again, the issue was whether or not it was "testimonial compulsion." Again, "words or conduct which lack testimonial characteristics are not protected by the Fifth Amendment." The court explained that the terms "interrogate" and "statement" in Article 31b "do not suggest that Congress meant to require that a warning be given before the investigator obtained from a suspect evidence which would not constitute a communication by that suspect." The court held that Article 31b covered the same matter as did the Fifth Amendment: testimonial communications and not body fluids."

5. Voice samples. In U.S. v. Chandler, 17 MJ 678 (ACMR, 1983), the court explained that "words or conduct which lack testimonial characteristics are not protected by the privilege against self-incrimination." A compelled voice sample does not, then involve Article 31, "because this evidence is not testimonial or communicative in nature." This "is not a statement... but is a physical act, similar in nature to appearing in a line-up or submitting to fingerprinting." The suspect is simply "exhibiting a physical characteristic." Such action "does not violate the privilege against self-incrimination." U.S. v. Akgun, 19 MJ 770 (ACMR, 1984).

6. Consent to search. Asking a suspect for his consent to a search also does not involve a "statement" within the coverage of Article 31. U.S. v. Thompson, 12 MJ 993 (AFCMR, 1982). Consequently, it does not require the giving of such warnings. U.S. v. Roa, 20 MJ 867 (AFCMR, 1985), Aff'd 24 MJ 297 (CMA, 1987).

7. Requests for identification. Article 31b applies to a request for "any statement regarding the offense of which he is accused or suspected." As a result, a "statement of a person's identity is not an element of a crime; nor does it tend to prove a crime." U.S. v. Davenport, 9 MJ 364 (CMA, 1980). One's identity, then, "is neutral." U.S. v. Lloyd, 10 MJ 172 (CMA, 1981). Requiring one to produce an identification card "does not require advice and warning in accordance with Article 31." U.S. v. Thomas, 10 MJ 687 (ACMR, 1981).

a. In U.S. v. Earle, 23 MJ 795 (NMCMR, 1981), a Marine Corps second lieutenant suspected the accused of having shouted disrespectful words concerning two commissioned officers. The lieutenant ordered the suspect, a private, to turn over his identification card "in order to clarify who the individual was that he suspected of violating the UCMJ." On appeal, the court held that there was no incrimination involved in asking the suspect to produce his U.S. Armed Forces identification card for purposes of identification. As

the court explained, this "does not require Fifth Amendment warnings." It was not a statement regarding an offense, and "lacks the qualities of communication contemplated by Article 31b."

b. In another case, a Navy NIS (Naval Investigative Service) agent obtained from the suspect "his full identification, name, rank, social security card number, date and place of birth, and his duty station." Such disclosure was held to be a "neutral" act, and not a statement regarding any offense. Thus, it was not within the protective coverage of Article 31. U.S. v. Leiffer, 13 MJ 337 (CMA, 1982).

8. Verbal acts. One who is conducting a lawful search is not required to advise a suspect of his Article 31 rights. A search incident to a lawful apprehension is not a request for a "statement." U.S. v. Culbert, 29 CMR 88 (CMA, 1960). In one case, the accused's superior suspected him of possessing marijuana. He said to the accused, "I think that you know what I want, give it to me." The accused then reached into his left pocket and produced a package of marijuana cigarettes. The court held that the accused's conduct in producing the drugs was the equivalent of a "statement" within the meaning of Article 31. U.S. v. Corson, 39 CMR 34 (CMA, 1968). In other words, an accused may lawfully be searched as part of a valid apprehension. This, of course, is called the "search incident to apprehension." In the Corson case, however, something more was involved. The accused was being asked to perform a discretionary act that is regarded as the equivalent as a statement; i.e., a "verbal act." U.S. v. Rehm, 42 CMR 161 (CMA, 1970). A good way to think of this is as follows: Unless the accused is under apprehension and is being ordered to empty his pockets (as part of a search incident to the apprehension), asking him to turn over evidence against himself involves a request for a "verbal act." By turning over the evidence, the accused is "admitting" that he does, in fact, have it. This is why the verbal act is regarded as the equivalent of a "statement."

Throughout the area of Article 31 warnings, remember that the focus is on testimonial communication. In one case, the accused was a suspect in a robbery that involved a fight. When the MP apprehended the suspect, the MP asked him about some bloodstains on his coat. The government argued that Article 31 warnings were not necessary, as this was not a request for a "statement." The court disagreed, and held that article warnings are not needed in the cases involving such things as requests for handwriting or voice exemplars. Those, however, are cases "where the content or meaning of the words spoken or written was irrelevant. Only the physical characteristics of the words -- how they are said and not what was said -- were material." Asking a suspect about the blood on his clothes was not considered to be part of the routine booking process. Under these facts, Article 31 warnings were necessary. The court explained that it would have been different if the suspect had been bleeding and if he had been asked how he got hurt in order for the MP to determine his physical condition. That, however, is not what happened. U.S. v. Williams, 23 MJ 362 (CMA, 1987).

## PART H - THE CONCEPT OF "OFFICIAL" QUESTIONING

The Concept of "Official" Questioning. By its language, Article 31 applies to persons "subject to this chapter," who interrogate or request a statement from the accused. In order for the protections of Article 31 to apply, we must have three things: (1) the individual who is questioned must be a suspect; (2) there must be an interrogation or a request for a "statement;" and (3) the questioner must be acting in an official capacity. The first two elements have already been examined.

1. Not all questioning is defined as "official." Interrogation by CID or MPI agents would clearly qualify as "official," but so too would the questioning of a suspect by his superior officers. U.S. v. Souder, 28 CMR (CMA, 1959). It also includes "a person acting as a knowing agent of a military unit or of a person subject to the code" (MRE 305(b)1). In U.S. v. Quillen, 27 MJ 312 (CMA, 1988), the court held that an AAFES store detective was acting in an official capacity.

2. FBI agents, for example are not subject to Article 31 or the UCMJ. The FBI is an independent federal agency, and the military does not directly or indirectly control its investigative efforts. Absent some subterfuge, or attempt to circumvent the law, FBI agents are not considered to be under the coverage of Article 31. U.S. v. Holder, 28 CMR 14 (CMA, 1959). This is also generally true for civilian police unless they are acting as our agents. For such an agency situation to exist, however, the court must find that the civilian police are acting "as an instrumentality of the military." This is not, of course, generally the case. In other words, if the civilian police are acting at the military's direction, this will trigger Article 31. U.S. v. Aau, 30 CMR 332 (CMA, 1961). Civilian police, of course, are covered by the requirements of the Miranda decision. This may require them to give the suspect certain warnings (based on Miranda, of course, and not Article 31), if the subject is in "custody." We will return to the subject of Miranda and the issue of "custody" shortly.

3. In order to constitute "official" questioning, the suspect must perceive the encounter to be "an official interrogation," which means that it is something "other than a business meeting." U.S. v. Wiggins, 13 MJ 811 (AFCMR, 1982). As an example, questioning by an NCO is generally going to be regarded as "motivated solely by personal considerations." U.S. v. Bartee, 50 CMR 51 (NCMR, 1974). Article 31 warnings, then, are only required "during the course of an investigation being conducted with some color of officiality." U.S. v. Trojanowski, 17 CMR 306 (CMA, 1954). The warnings are aimed at "the effect of superior rank or official position," which create pressure upon the suspect to confess. Such a situation would not apply where the accused is questioned by a fellow prisoner. U.S. v. Gibson, 14 CMR 164 (CMA, 1954).

4. In one case, the victim of a larceny confronted the accused. Since the victim was accompanied by a CID agent, however, this made the questioning "official," so the Article 31 warnings were necessary. U.S. v. Josey, 14 CMR 185 (CMA, 1954). In U.S. v. Woods, 47 CMR 125 (CMA, 1973), a charge of quarters (CQ) questioned a suspect regarding drug offenses. The court

explained that Article 31 "does not require threshold advice in all instances where one member of the Armed Forces questions another about a crime which he suspects or knows the other has committed... The ultimate inquiry... is whether the individual, in line of duty, is acting on behalf of the service or is motivated solely by personal considerations when he seeks to question one whom he suspects of an offense." Here the CQ was acting "in discharge of his duties as CQ" and was "directly engaged in performance of the responsibilities of a command CQ during a regular tour of duty." He was, then, "the commander's representative," and Article 31 warnings were required. In one case, even though the MP who questioned the suspect said he was a personal friend, his questioning was still found to be "official." The issue was whether or not he acted as an MP on behalf of the Army; the court said that he did. U.S. v. Beck, 34 CMR 305 (CMA, 1965).

5. In U.S. v. Duga, 10 MJ 206 (CMA, 1981), an Air Force security policeman had known the accused "for approximately a year and a half, and the two of them had lived and consorted in the same military dormitory and gone out together during the evenings." The accused was a former security policeman. After the accused had been questioned by the OSI (Office of Special Investigations) agents, he encountered his friend, Airman Byers, an Air Force security police officer. Airman Byers said that "he was curious about rumors he had heard" and he asked the accused "what he was up to." It was "a long night" and Byers said that "it was kind of nice to have someone to talk to." The accused responded that "he was looking for a place to hide his van because the OSI was looking for it, and that he still had something in it." Byers then asked him "what was the deal that was going on back when he was on leave?" The accused answered that he had been caught with a canoe and chain saw that had been stolen from the base. Byers later went to the OSI and reported what the accused had said to him.

6. At trial, Byers denied that he questioned the accused while acting in an official capacity, and said that the conversation "was only more or less buddy-to-buddy talk." He said that OSI had not directed him to talk to the accused, and said that his purpose was not to get information. Instead, he said he was speaking "more or less like a friend to a friend... just out of my own curiosity." He said he was not an OSI informant, but was acting in a personal capacity, prompted simply by his own curiosity.

7. On appeal, the court had to decide whether the questioning was official. The purpose of Article 31, it explained, was to counter "the effect of superior rank or official position upon one subject to military law." Since such pressure may make the "asking of a question... the equivalent of a command," Article 31 warnings are "a precautionary measure" to deal with the coercion that is inherent in military discipline and superiority. The protection, then, "applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry." Accordingly, in such cases, "it is necessary to determine whether (1) a questioner subject to the code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more

than a casual conversation." As an example, if a fellow prisoner were to ask "what are you in for?" Article 31 warnings would not be necessary.

8. In this case, the court decided that "the questioning was not done in an official capacity... Byers was not acting on behalf of the Air Force -- either as a security policeman or as an agent of the OSI... the questioning by Byers was solely motivated by his own personal curiosity and was entirely unconnected with his previous contact with the OSI." The OSI did not direct nor advise him to question the accused. Also, "the appellant could not possibly have perceived his interrogation as being official in nature. The evidence portrays a casual conversation between comrades... The appellant could not have envisioned that Byers was acting in an official capacity. Moreover, there was no subtle coercion of any sort which could have impelled the appellant to answer Byers's questions."

9. This is similar to what happened in U.S. v. Kirby, 8 MJ 8 (CMA, 1979). There, the OSI had received information that property missing from the base medical center was in a trailer shared by two sergeants, one of whom was the accused. When questioned by the OSI, the other sergeant, SGT English denied everything, but said that he had seen the accused with the property at the trailer. SGT English "suggested that he be permitted to attempt to persuade the accused to surrender it to the OSI." The OSI commander said it "seemed like the only thing to do." Under these facts, the issue was whether or not SGT English was acting in an official capacity when he told the accused that he should return the property. The court held that he was not, explaining its conclusion in the following way:

"In determining whether English acted in an official capacity, we recognize that the OSI agreed to allow English to proceed. However, they did not contribute in any way to the details of English's activities. He was given no directions or advice. There was not even any arrangement for English to make reports to OSI on his progress. No promises were made to English conditioned on return of the property. Agent Reid (OSI) even admitted that they did not have any assurance that English would give the accused the opportunity to destroy the property or otherwise dispose of it. Furthermore, the OSI did not have anyone watching the trailer or English. When English left the OSI, he was free to pursue his own devices. Indeed, he was even free to do nothing. But he approached the accused and told him he had better bring the property back because the OSI knew he had the items. This was a true statement."

10. Here, then, SGT English did not question the accused at the request of OSI. He "was acting entirely for his own benefit to clear himself from suspicion of theft." What the OSI did "in essence was to tell English he could do as he chose... we decline to require that law enforcement officials take steps to prevent citizens from acting as English did, which in reality merely amounted to advising his friend and roommate what the OSI knew, and then suggesting the obvious."

11. The Duga case may be old, but it is still solid legal precedent. The principles of the case were followed recently in U.S. v. Pittman, 36 MJ 404

(CMA, 1993), accused's section leader, and friend, was required to escort him off post. Escort, unaware of child abuse allegations against the accused, asked what was going on. The accused, in response to this unwarned questioning, admitted hitting his stepson. The trial court held that this questioning was motivated out of personal curiosity and not interrogation or a request for a statement within the meaning of Article 31(b). CMA affirmed, citing the Duga case.

12. Since Article 31 warnings are designed to counter the coercion that is implicit in military rank and discipline, the warnings are generally not required in the case of undercover informants who meet with the suspects of criminal investigations. U.S. v. Hinkson, 37 CMR 390 (CMA, 1967). Indeed, in the context of a covert drug operation, such a warning could prove fatal to the one giving it. The question remains, however, as to just how far such undercover activities can go, before Article 31 warnings are required. As an example, if the accused has had an attorney appointed to represent him, questioning by an undercover informant will conflict with the accused's right to counsel under the Sixth Amendment to the U.S. Constitution. U.S. v. Henry, 447 US 264, 65LEd2d 115, 100 Sct 2183 (1980). Consequently, do not attempt any such measure with an accused who already has an attorney, or against whom charges have been preferred, without first consulting with the trial counsel.

The same is true for an accused who is in pretrial restraint.

13. Keep in mind the definition of "official" in the Duga case. Also, remember that Article 31 was intended to protect a suspect from the pressure inherent in military discipline and superiority. Consequently, "only in situations where because of rank, duty, or other similar relationship, there was a possibility of subtle pressure on a suspect to respond would Article 31, UCMJ, apply." Where a suspect was confronted by the victim of his assault, "she in no way stood in a position of authority over (the accused)." Thus, "it was... not possible for her to impose on him any of the subtle pressure or coercion to make a self-incriminating statement, which Article 31 was intended to counter." The suspect, therefore, "had no rational basis to believe his conversations with (her) were anything more than private, emotion-ridden (conversations)... so that Article 31 did not apply to them." U.S. v. Martin, 31 MJ 730 (NMCMR, 1985). When a husband attempted to poison his wife by putting something in her food, she wasn't required to advise him of his rights before asking him about it." Both were Air Force E-6's. U.S. v. Fayne, 26 MJ 528 (AFCMR 1988).

14. There is, however, a limit: U.S. v. Johnstone, 5 MJ 744 (AFCMR, 1978), is a case where the government simply went too far. An OSI informant worked with the suspect in base supply. As an informant, he provided the OSI with information and evidence relating to the suspect's involvement in the theft of government property from supply channels. The informant was instructed by OSI to go to the accused's room and ask him questions, and then report back to OSI. The defense argued that the informer was a "de facto agent" of the OSI who was directed by his supervising agents to do that which they knew fully well they could not: question the (suspect) without first warning him of his

rights under Article 31." The admissions made by the suspect were in response to specific questions that were asked by the informant.

15. The court first held that the questions were not asked out of the informant's idle curiosity. Also, the informant was not acting in a purely personal capacity. It explained that "the Article 31 requirement does not apply to an undercover agent who merely engages in a casual conversation with an unwary suspect." There is, the court explained, no compulsion in such a situation. Here, however, the informant "did not engage the accused in ordinary conversation." Instead, he asked specific questions "which were calculated to evoke incriminating responses from an accused... and, of utmost significance, the undercover informant's questions which evoked incriminating responses were propounded on specific instructions from OSI." The court concluded that "the sending of (the informant) to accomplish precisely that which the OSI could not personally do rendered (his) conduct official for purposes of Article 31." In other words, the courts will accommodate the interests of law enforcement, but do not try to stretch the informant exception too far. However, the decision in Johnston must be considered in light of the Supreme Court's recent decision in Illinois v. Perkins, 496US 292, 110 S.Ct. 2394 110LED2d 243 (1990). In Perkins, civilian police suspected the accused -- already in jail on unrelated charges -- of murder. An undercover informant was placed in the accused's cell. He questioned the accused about the murder. The accused made incriminating remarks which were used to convict him. All of the lower courts found the statements inadmissible; however, the Supreme Court ruled the statements were admissible because there was no "police-dominated atmosphere or compulsion." The Court relied on the absence of any coercion and further stated that Miranda "does not forbid mere strategic deception by taking advantage of a suspect's misplaced trust."

Finally, let's consider whether medical personnel and social workers are required to inform a suspect of Article 31 rights when they ask questions for purposes of medical treatment.

16. Medical personnel and social workers are not required to inform a suspect of Article 31 rights as long as the questions are asked for purposes of medical treatment not law enforcement. Two recent CMA cases address this issue. In U.S. v. Bowerman, 39 MJ 219 (CMA, 1994), an Army doctor was not required to inform accused of Article 31 rights when questioning about injuries to a child, even if doctor thought that child abuse was a distinct possibility. The doctor's purpose was medical diagnosis, not questioning for an official law enforcement/disciplinary purpose. Similarly, in U.S. v. Raymond, 38 MJ 136 (CMA, 1993), a social worker, subject to AR 608-18's reporting requirements, was not acting as an investigative agent of law enforcement when he counseled the accused with full knowledge that the accused was- pending charges for child sexual abuse. CMA also ruled that health professionals engaged in treatment do not have a duty to provide Article 31(b) warnings. Please note that even in cases of self-referral, R 608-18 does not create a limited use policy which prevents prosecution of child abusers. It must be noted, however, that under MRE 803(4), the burden of establishing the medical diagnosis or treatment exception is firmly placed upon the government.

In U.S. v. Henry, (ACCA, 1995), statements made by a 15 year old victim to medical personnel were not made with the expectation of receiving medical benefits but for the purpose of facilitating collection of evidence. In dicta, the court notes, in cases where a medical examination is inextricably intertwined with a criminal investigation, and where there is no expressed indication by the "patient" that she had some expectation of receiving a medical benefit, the burden of establishing medical diagnosis or treatment exception is a heavy one for the government. The court notes it may be better practice for CID agents to remain outside the exam room when medical personnel are conducting the rape protocol exam.

## PART I - THE RIGHT TO COUNSEL

1. General. As we have seen, Article 31, UCMJ, does not itself include a suspect's right to counsel. This right, instead, comes from the Supreme Court's Miranda decision. The point to remember is that the right to counsel is a separate protection for the accused, one that exists apart from Article 31. It is an equally important right, however, and must be both understood and observed.

a. In Miranda v. Arizona, 384US 436, 16 L.Ed.2d 694 86 Sct. 1602 (1966), the Supreme Court held that a suspect has certain procedural rights when he is subjected to "custodial interrogation." This was defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Before such a person could be interrogated, the court ruled that he "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." The first two rights, you will notice, are also contained in Article 31.

b. As for the right to counsel, the court held that if the suspect indicates that he wishes to consult with an attorney before speaking, then "there can be no questioning." The same is true if he so indicates at some point during the questioning. In other words, the suspect can invoke his right to counsel at some point during the questioning. The fact that he has answered some questions does not mean that he is obligated to continue doing so. In either situation, the suspect who asks for a lawyer is not subject to further interrogation in the absence of counsel.

c. Remember, the right to counsel applies to a suspect "while in custody or otherwise deprived of his freedom of action in any significant way." In order to protect the suspect's Fifth Amendment right against self-incrimination, "the accused must be adequately and effectively appraised of his rights and the exercise of those rights must be fully honored." Warning the suspect of his right to remain silent "will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." A warning that anything said can be used against the suspect "may serve to make the individual more acutely aware that he is faced with a phase of the adversary system -- that he is not in the presence of persons acting solely in his interests." Advice regarding the right to counsel is

equally "indispensable" as it assures that the individual's rights are protected "throughout the interrogation process." The suspect, then, has a right to consult with counsel prior to questioning, and also has a right "to have counsel present during any questioning" if he so desires. The suspect must be told "that if he is indigent, a lawyer will be appointed to represent him." In summary, Miranda held as follows:

"...(W)hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way, and is subject to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege... He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation... unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as the result of the interrogation can be used against him."

d. Without prior warnings, then, there will be no waiver. The court held that "we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." The court will not so speculate. Regardless of the suspect's background (age, education, intelligence, prior to contact with authorities, etc.), "a warning at the time of interrogation is indispensable." The warnings are a prerequisite to the admissibility of the suspect's confession.

e. If the suspect will not waive his rights, he is not subject to being interrogated. Following the warnings, "if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." A suspect, as we have seen, may waive his rights "knowingly and intelligently." An example of this would be by way of "an express statement that the individual is willing to make a statement and does not want an attorney." A waiver "will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." The record must show the waiver to have been "intelligently and understandingly" made.

f. In U.S. v. Tempia, 37 CMR 249 (CMA, 1967), the court held that Miranda set forth "concrete rules which are to govern all criminal interrogations by federal or state authorities, military, or civilian." (MRE 305(d)(1)(A)) is patterned after Miranda, and requires right to counsel warnings (in addition to Article 31 warnings) when "the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way." The right to counsel warnings also apply if the interrogation is conducted "subsequent to preferral of charges or the imposition of pretrial restraint... and the interrogation concerns the offenses or matters that were the subject of the

preferral of charges or were the cause of the imposition of pretrial restraint" (MRE 305(d)(1)(B)). In such situations, the Sixth Amendment right to counsel requires such warning. U.S. v. Henry, 447 US 264, 65LEd2d 115, 100 Sct. 2183 (1980). In the military, MRE 305(d)(2) states that the suspect's right to counsel exists "at no expense to the person and without regard to the person's indigency (lack of funds)."

2. The meaning of "custodial interrogation." As we have seen, Article 31 is triggered when a suspect is questioned by one acting in an official capacity. Article 31, however, does not include the suspect's right to counsel. That right, instead, comes from the Miranda decision, which held the right to be triggered by "custodial interrogation."

a. In one case, at 0400 hours, the suspect was asleep at home in his room in a boardinghouse. Four police officers arrived and were admitted by a woman who told them the suspect was asleep upstairs. The four entered the bedroom and questioned the suspect about a murder. They did not advise him of his rights. They did, however, candidly admit that he "was not free to go where he pleased but was under arrest." Nonetheless, they proceeded to interrogate him. On appeal, the Supreme Court acknowledged that the suspect was questioned "on his own bed, in familiar surroundings." Still, however, he was in custody. He was under arrest, so clearly he had been "deprived of his freedom of action in any significant way." Orozco v. Texas, 394 US 324, 22LEd2d 311, 89 Sct. 1095 (1969).

b. Compare the above case with Oregon v. Mathiason, 429 US 492, 50 L.Ed.2d 714 94 Sct 711 (1977). There, the suspect was on parole, and was thought to have been responsible for a recent burglary. After several unsuccessful attempts to contact the suspect, a police officer left his card at the suspect's apartment with a note asking him to call "because I would like to discuss something with you." The next afternoon, the suspect called. The officer asked the suspect where it would be convenient to meet, and the suspect said he had no preference. The officer then asked the suspect to meet him at the state patrol office at 5:00 P.M., which was located about two blocks from the suspect's home. The meeting was described as follows:

"The officer met defendant in the hallway, shook hands, and took him into an office. The defendant was told he was not under arrest. The door was closed. The two sat across a desk... The officer told defendant he wanted to talk to him about a burglary."

c. The Supreme Court decided that the suspect was not subjected to custodial interrogation; consequently, advice regarding his right to counsel was not necessary. The suspect was not in custody and had not been deprived of his freedom of action in any significant way: "There is no indication that the questioning took place in a context where (the suspect's) freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest." The simple fact that the questioning took place at the police station did not itself make it "custodial interrogation." Indeed, "Miranda warnings are required only

where there has been such a restriction on a person's freedom as to render him 'in custody'."

d. In Mathis v. U.S., 391 US 1, 20 L.Ed.2d 381, 88 Sct 1503 (1969), the defendant was questioned by an Internal Revenue Service (IRS) agent, while he (the defendant) was in jail on an unrelated conviction. The defendant was held to have been "in custody." The opposite result came in California v. Beheler, 463 US 1121, 77L.Ed2d 1275 103 Sct 3517 (1983). There, the suspect "voluntarily agreed to accompany police to the station house, although the police specifically told (him) that he was not under arrest." He was questioned without being advised of Miranda rights. After a 30-minute interview, he was permitted to return to his home. The Supreme Court held that the suspect "was neither taken into custody nor significantly deprived of his freedom of action. Indeed, (his) freedom was not restricted in anyway whatsoever."

e. The rule is that "a person subjected to custodian interrogation is entitled to the benefit of the procedural safeguards enunciated in Miranda, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested." Berkemer v. McCarty, 468 US 420 82 L.Ed.2d 317 104 Sct 3138 (1984). The right to counsel, again, exists separate and apart from Article 31, UCMJ. Where the suspect is not in custody, Article 31 may apply, but not the right to counsel under Miranda. At the same time, FBI agents who are not acting on behalf of the military (as our agents) are not required to give Article 31 warnings. They are not persons "subject to the code." If they interrogate a suspect "in custody," however, the right to counsel under Miranda will apply (wholly apart from Article 31). U.S. v. Temperley, 47 CMR 237 (CMA, 1973).

f. California v. Beheler, 463 US 1121 77 L.Ed.2d 1275 103 Sct 3517 (1983), held that "the circumstances of each case;" i.e., the "totality of the circumstances," will determine whether or not custodial interrogation has occurred. For the investigator, the safest procedure is to advise the suspect of BOTH his Article 31 rights, as well as the right to counsel under Miranda. This avoids unnecessary confusion (and litigation) as to whether or not the suspect was in custody. The language of MRE 305(d)(1)(A), remember, speaks in terms of a suspect who, among other things, "could reasonably believe himself or herself to be in custody." If you fail to include advice concerning the right to counsel, you are taking a risk. Based on the suspect's testimony at trial, the court may find that he was, in fact, in custody (or so he reasonably believed). The suspect, in other words, may be able to convince the court that he really was not free to leave, or that such is what he reasonably believed. Remember, Miranda noted the inherently coercive nature of police station interrogation. Do not gamble here -- the stakes are too high. Advise the suspect of all his rights. It is far better to be safe than sorry. If the right to counsel does apply (due to the existence of custodial interrogation), your failure to include proper right to counsel warnings will trigger the exclusionary rule. This means that the confession which you obtain will not be admissible at trial against the accused. Do not speculate and gamble on a court finding that the suspect was not in custody. Always play it safe.

## PART J - ADVISING A SUSPECT OF HIS RIGHTS

Advising a Suspect of His Rights. As we have seen, a suspect must be advised of his rights before he can be interrogated. Remember, there are rights under both Article 31 and there is a right to counsel under Miranda. Article 31, you will recall, requires advice as to the nature of the accusation, that the suspect has the right to remain silent, and that anything the suspect says may be used against him at trial. If there is "custodial interrogation," then the right to counsel also applies, requiring additional warnings.

1. This does not mandate a verbatim recital of the exact wording of the Miranda decision. Such rigidity is not required. The exact wording or order of the warnings need not exactly parrot the language of Miranda; rather, the appellate courts will look to the substance of the warnings given to the suspect. California v. Prysock, 453 US 355 69 L.Ed.2d 696, 101 SCt 2806 (1981) and Duckworth v. Eagen, 492 US 195 106L.Ed2d 166 109 S.Ct.2875 (1989). Still, deviating, or straying, from the wording of Miranda may be risky, so you must be very careful. In one case, for example, the suspect was told that she could "have an attorney appointed to represent you when you first appear before the U.S. Commissioner or the court." This was insufficient, as it did not clearly explain the right to counsel at the interrogation. U.S. v. Garcia, 431 F.2D 134 (9th Circuit, 1970). Similarly, if you stray from the precise wording of the Article 31, you are also taking a risk. You will, of course, remember that Article 31 grants the suspect a right to remain silent. Simply telling him that he need not incriminate himself; however, is not enough. U.S. v. Williams, 9 CMR 60 (CMA, 1953). Also, telling a suspect that he has a right not to make "any statement in writing" is insufficient. U.S. v. Murray, 11 CMR 495 (ABR, 1953). In other words, you need not recite the Miranda decision word-for-word. Be careful, however, since if you stray too far, you may wind up with a defective rights advisement and an inadmissible confession.

2. When you advise a suspect of his rights, the simplest way is to simply read off of a Rights Warning Procedure/Waiver Certificate (DA Form 3881) or off of a "Miranda Card" (GTA 19-6-6). Both are reproduced at Figures 1 and 2. Both include coverage of the suspect's rights under Article 31 as well as the right to counsel. By using the form or card, you will be sure to include all of the necessary advice to the suspect, and will not run the risk of leaving something out. Also, it will be far easier for you (and the government) to establish a valid waiver of the suspect's rights. If you use the DA Form 3881, for example, it can be introduced into evidence at trial.

<b>RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE</b> <small>For use of this form, see AR 190-30; the proponent agency is ODCSOPS</small>			
<b>DATA REQUIRED BY THE PRIVACY ACT</b>			
<b>AUTHORITY:</b> Title 10, United States Code, Section 3012(g) <b>PRINCIPAL PURPOSE:</b> To provide commanders and law enforcement officials with means by which information may be accurately identified. <b>ROUTINE USES:</b> Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval. <b>DISCLOSURE:</b> Disclosure of your Social Security Number is voluntary.			
1. LOCATION	2. DATE	3. TIME	4. FILE NO.
5. NAME <i>(Last, First, MI)</i>		8. ORGANIZATION OR ADDRESS	
6. SSN	7. GRADE/STATUS		
<b>PART I - RIGHTS WAIVER/NON-WAIVER CERTIFICATE</b>			
<b>Section A. Rights</b>			
<p>The investigator whose name appears below told me that he/she is with the United States Army _____ and wanted to question me about the following offense(s) of which I am suspected/accused: _____</p> <p>Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights:</p> <ol style="list-style-type: none"> <li>1. I do not have to answer any question or say anything.</li> <li>2. Anything I say or do can be used as evidence against me in a criminal trial.</li> <li>3. <i>(For personnel subject to the UCMJ)</i> I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both.</li> <li style="text-align: center;">- or -</li> <li><i>(For civilians not subject to the UCMJ)</i> I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. I understand that this lawyer can be one that I arrange for at my own expense, or if I cannot afford a lawyer and want one, a lawyer will be appointed for me before any questioning begins.</li> <li>4. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below.</li> </ol>			
5. COMMENTS <i>(Continue on reverse side)</i>			
<b>Section B. Waiver</b>			
I understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.			
WITNESSES <i>(If available)</i>		3. SIGNATURE OF INTERVIEWEE	
1a. NAME <i>(Type or Print)</i>			
b. ORGANIZATION OR ADDRESS AND PHONE		4. SIGNATURE OF INVESTIGATOR	
2a. NAME <i>(Type or Print)</i>		5. TYPED NAME OF INVESTIGATOR	
b. ORGANIZATION OR ADDRESS AND PHONE		6. ORGANIZATION OF INVESTIGATOR	
<b>Section C. Non-waiver</b>			
1. I do not want to give up my rights <input type="checkbox"/> I want a lawyer <span style="margin-left: 100px;"><input type="checkbox"/> I do not want to be questioned or say anything</span>			
2. SIGNATURE OF INTERVIEWEE			
ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT <i>(DA FORM 2823)</i> SUBSEQUENTLY EXECUTED BY THE SUSPECT/ACCUSED			

DA FORM 3881, NOV 89

EDITION OF NOV 84 IS OBSOLETE

USAPA 2.01

Figure 1. DA Form 3881, Rights Warning Procedure/Wavier Certificate (Front).

PART II - RIGHTS WARNING PROCEDURE	
<b>THE WARNING</b>	
<p>1. <b>WARNING</b> - Inform the suspect/accused of:</p> <ul style="list-style-type: none"> <li>a. Your official position.</li> <li>b. Nature of offense(s).</li> <li>c. The fact that he/she is a suspect/accused.</li> </ul> <p>2. <b>RIGHTS</b> - Advise the suspect/accused of his/her rights as follows:</p> <p>"Before I ask you any questions, you must understand your rights."</p> <ul style="list-style-type: none"> <li>a. "You do not have to answer my questions or say anything."</li> <li>b. "Anything you say or do can be used as evidence against you in a criminal trial."</li> <li>c. (For personnel subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer</li> </ul>	<p>can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."</p> <p style="text-align: center;">- or -</p> <p>(For civilians not subject to the UCMJ) You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be one you arrange for at your own expense, or if you cannot afford a lawyer and want one, a lawyer will be appointed for you before any questioning begins."</p> <ul style="list-style-type: none"> <li>d. "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate."</li> </ul> <p>Make certain the suspect/accused fully understands his/her rights.</p>
<b>THE WAIVER</b>	
<p>"Do you understand your rights?" (If the suspect/accused says "no," determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question.)</p> <p>"Have you ever requested a lawyer after being read your rights?" (If the suspect/accused says "yes," find out when and where. If the request was recent (i.e., fewer than 30 days ago), obtain legal advice whether to continue the interrogation. If the suspect/accused says "no," or if the prior request was not recent, ask him/her the following question.)</p>	<p>"Do you want a lawyer at this time?" (If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)</p> <p>"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?" <i>If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect/accused says "yes," have him/her read and sign the waiver section of the waiver certificate on the other side of this form.)</i></p>
<b>SPECIAL INSTRUCTIONS</b>	
<p><b>WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE:</b> If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.</p> <p><b>IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY:</b> In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.</p> <p><b>PRIOR INCRIMINATING STATEMENTS:</b></p> <ul style="list-style-type: none"> <li>1. If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights he/she should be told that such statements do not obligate him/her to answer further questions.</li> </ul>	<ul style="list-style-type: none"> <li>2. If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal.</li> </ul> <p><b>NOTE:</b> If 1 or 2 applies, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initialed by the suspect/accused.</p> <p><b>WHEN SUSPECT/ACCUSED DISPLAYS INDECISION ON EXERCISING HIS OR HER RIGHTS DURING THE INTERROGATION PROCESS:</b> If during the interrogation, the suspect displays indecision about requesting counsel (for example, "Maybe I should get a lawyer."), further questioning must cease immediately. At that point, you may question the suspect/accused only concerning whether he or she desires to waive counsel. The questioning may not be utilized to discourage a suspect/accused from exercising his/her rights. (For example, do not make such comments as "If you didn't do anything wrong, you shouldn't need an attorney.")</p>
<p><b>COMMENTS</b> (Continued)</p>	

REVERSE OF DA FORM 3881

USAPA V2.01

Figure 1. DA Form 3881, Rights Warning Procedure/Waiver Certificate (Back).



**HOW TO INFORM SUSPECT/ACCUSED  
PERSONS OF THEIR RIGHTS**

*Use this card only when DA Form 3881, Rights Warning Procedure/Waiver Certificate, cannot be used. Complete DA Form 3881 as soon as possible.*

**VERBAL RIGHTS WARNING**

*Inform the person of your official position, the nature of the offense(s), and the fact that he/she is a suspect/accused. Then read him/her the following--do not paraphrase; read verbatim:*

**"BEFORE I ASK YOU ANY QUESTIONS, YOU MUST UNDERSTAND YOUR RIGHTS."**

- 1 "YOU DO NOT HAVE TO ANSWER MY QUESTIONS OR SAY ANYTHING."**
- 2 "ANYTHING YOU SAY OR DO CAN BE USED AS EVIDENCE AGAINST YOU IN A CRIMINAL TRIAL."**
- 3 (For personnel subject to the UCMJ) "YOU HAVE THE RIGHT TO TALK PRIVATELY TO A LAWYER BEFORE, DURING, AND AFTER QUESTIONING AND TO HAVE A LAWYER PRESENT WITH YOU DURING QUESTIONING. THIS LAWYER CAN BE A CIVILIAN YOU ARRANGE FOR AT NO EXPENSE TO THE GOVERNMENT OR A MILITARY LAWYER DETAILED FOR YOU AT NO EXPENSE TO YOU, OR BOTH."**  
**(For civilians not subject to the UCMJ) "YOU HAVE THE RIGHT TO TALK PRIVATELY TO A LAWYER BEFORE, DURING, AND AFTER QUESTIONING AND TO HAVE A LAWYER PRESENT WITH YOU DURING QUESTIONING. THIS LAWYER CAN BE ONE YOU ARRANGE FOR AT YOUR OWN EXPENSE, OR IF YOU CANNOT AFFORD A LAWYER AND WANT ONE, A LAWYER WILL BE APPOINTED FOR YOU BEFORE ANY QUESTIONING BEGINS."**
- 4 "IF YOU ARE NOW WILLING TO DISCUSS THE OFFENSE(S) UNDER INVESTIGATION, WITH OR WITHOUT A LAWYER PRESENT, YOU HAVE A RIGHT TO STOP ANSWERING QUESTIONS AT ANY TIME, OR SPEAK PRIVATELY WITH A LAWYER BEFORE ANSWERING FURTHER, EVEN IF YOU SIGN A WAIVER CERTIFICATE."**

*Make certain the suspect/accused fully understands his/her rights, then say:*

**"DO YOU WANT A LAWYER AT THIS TIME?"**

**"AT THIS TIME, ARE YOU WILLING TO DISCUSS THE OFFENSE(S) UNDER INVESTIGATION AND MAKE A STATEMENT WITHOUT TALKING TO A LAWYER AND WITHOUT HAVING A LAWYER PRESENT WITH YOU?"**

*(See DA Form 3881 for more detailed instructions )  
Department of the Army Graphic Training Aid  
Supersedes GTA 19-6-5, July 1985*

**GTA 19-6-6, June 1991**

Figure 2. GTA 19-6-6, Verbal Rights Warning.

3. There is no need for you to memorize the rights warning, administer them from your memory, and then testify in court that you did so. Some investigators think that this will impress the court with their memory capabilities. Actually, it is a combination tailor-made for disaster. Instead of impressing the court, you risk doing just the opposite. At trial, the accused may testify that he was not properly advised of his rights. As the person who did the rights advisement, your testimony will be absolutely critical. You will, literally, make or break the government's case. Unless you testify in a credible manner, the battle will be lost before it has even begun. At trial, all eyes will focus on you. Your testimony must be convincing. The defense attorney, of course, will be trying to impeach you, trying to show that your memory is bad and that you did not adequately advise the suspect of his rights. Do not take it personal -- the defense counsel is only doing his job. The point is that if you do your job properly, the defense counsel will not be able to impeach, or destroy, the effectiveness of your testimony. You must be prepared for what will happen at trial. When the defense questions you, it will NOT be like the following:

QUESTION: Did you advise the suspect of his rights?

ANSWER: Yes.

QUESTION: Did you tell him his rights under Article 31, UCMJ?

ANSWER: Yes.

QUESTION: Did you also advise him of his right to counsel under Miranda?

ANSWER: Yes.

QUESTION: More specifically, did you advise him that he had a right to remain silent?

ANSWER: Yes.

QUESTION: Did you tell him he had a right to an attorney?

ANSWER: Yes.

QUESTION: Did you tell him he could have the attorney present during the interrogation?

ANSWER: Yes.

QUESTION: Did you tell him he could consult with the attorney prior to interrogation?

ANSWER: Yes.

Do not expect it to go so smoothly. As was noted, testifying in the court is not quite so simple. In the above example, the witness is not really even

testifying. The questioner is asking leading questions that include the answers. Such questions are obviously very easy to answer. You do not have to think about the answer at all; simply say "yes" to each question. Unfortunately, that is not the way it goes at trial. Do not expect the defense counsel to make your life quite that simple. More realistically, it will go as follows:

QUESTION: Did you advise the accused of his rights?

ANSWER: Yes.

QUESTION: What did you tell him?

ANSWER: ?

Here the situation is very different. The question has not given away the answer. Now, the witness must find the answer and testify in a convincing manner. Without the leading questions, then, testifying is much more difficult. In this case, it is easy for the investigator to omit something. As is the case with any witness, under the strain and pressure of cross-examination, and as a result of the natural nervousness caused by testifying at trial, your memory may fail you. It is natural to be nervous when testifying. All witnesses share this feeling, as do most of the attorneys. The point is that if you are prepared to properly testify, your natural nervousness will not be a handicap. Otherwise, as was stated, the result may be a disaster. Consider the following:

QUESTION: Did you advise the accused of his rights under Article 31?

ANSWER: Yes.

QUESTION: What did you tell him?

ANSWER: I said that anything he said could be used against him, that he had a right to remain silent, and that he had a right to an attorney.

QUESTION: What else?

ANSWER: I said he had the right to consult with the attorney before and during the questioning, and that he could stop anytime that he wanted to.

QUESTION: Is that all?

ANSWER: I told him that if he did not have an attorney, one would be provided for him. I asked him if he understood his rights and he said that he did.

QUESTION: Is that all?

ANSWER: I asked him if he was willing to talk to me without an attorney being present, and he said he was.

QUESTION: Is that all?

ANSWER: Yes.

QUESTION: Are you sure?

ANSWER: Yes.

QUESTION: You are positive that is what you told him?

ANSWER: I think so.

QUESTION: Are you certain of that? Do not guess.

ANSWER: Yes, I am positive.

4. In the above situation, can you tell what was omitted? The investigator, testifying from memory, has omitted any reference to having advised the suspect of the nature of the accusation against him. That is, however, a critical part of the Article 31 rights advisement. The failure to include it renders the warning defective, and may result in suppression of the statement. The investigator may try to claim that he really did give that warning, yet he would now be contradicting his sworn trial testimony. According to his own testimony, under oath, he did not include that part of the warning. Not only that, but he said he was positive of it. The investigator has now been turned into a witness for the defense, and has impeached the government's own case. Even if the witness convinces the judge that he was mistaken and just forgot to include that warning in his testimony, the witness's testimony has been shown to be fallible or poor. The witness has testified under oath and has been proven to be wrong. The defense counsel has now impeached the investigator, who may be the government's main, or only, witness. The witness's bad memory may shatter the rest of the government's case.

5. Remember, Article 31 only requires three warnings. Here, the witness has testified that he could only remember two out of the three. That is not very good. Since his memory has been shown to be fallible, the rest of his testimony is now subject to doubt. The defense counsel will ask what else the investigator has forgotten, and may argue that the investigator is confusing the accused's case with some other case he worked on a couple of months ago. After all, the human memory is error-prone, and the witness has already been shown to be capable of error.

6. The point is simple: why let the defense counsel do this to you? It is far preferable to simply read the suspect his rights using the forms noted. If this is done, there is no question as to what was said -- it is written on the form. You simply testify that you read the form. The document can then be admitted as an exhibit. Since the witness will testify that he read the suspect his rights off the form, the document can then be admitted as an

exhibit. The ability (or inability) to memorize the content of the form is immaterial. This way, the government's case is made a lot simpler and a lot cleaner. The prosecutor will thank you and, when you are done testifying, you will thank yourself.

7. Sometimes, of course, the suspect will refuse to sign the DA Form 3881, or anything else indicating that he has been advised of his rights and has waived them. He may be perfectly willing to talk to the police, but will not sign the form. In Connecticut v. Barrett, 479 US 523 93LEd2d920 107Sct828 (1987), the suspect was advised of his rights prior to being questioned about a sexual assault. He said he understood his rights and was willing to talk about the incident, but said that he would not give a written statement unless his attorney was present. He was again advised of his rights and repeated that he was willing to talk to the police about the incident verbally, but did not want to put anything in writing until his attorney came. The police, therefore, proceeded to take an oral statement.

8. The Supreme Court held that the suspect "made clear to the police his willingness to talk about the crime for which he was a suspect." The suspect had said that he wanted an attorney before a "written statement." The police did not, however, attempt to subsequently obtain a written statement from him. Indeed, they could not properly have done so. His limited request for counsel was accompanied "by affirmative announcements of his willingness to speak with the authorities." His request for an attorney prior to making a written statement had been honored by the police. His decision may have been illogical, but that was not the point. The confession was admissible, and the conviction was upheld.

#### PART K - INTERROGATION OF CIVILIAN SUSPECTS

If a civilian is suspected of an offense, agents and investigators should be familiar with Title 18 U.S.C. section 3501 which deals with admissibility of confessions in any criminal prosecution in federal court. A confession is defined as "... any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing." 18 U.S.C. section 3501(e). The federal judge must determine if this confession was voluntarily given before it can be considered by the jury. In a hearing out of the presence of the jury, the judge will make this determination based upon the totality of the circumstances surrounding the taking of the confession including the following factors set out at 18 U.S.C. section 3501(b):

a. the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment,

b. whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession,

c. whether or not such defendant was advised or knew he was not required to make any statement and that any such statement could be used against him,

d. whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel, and

e. whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of these factors is not always conclusive of the voluntariness issue. However, giving a full rights advisement using the DA Form 3881 and getting a voluntary waiver thereof would a substantially favorable impact on the judge's determination of the critical admissibility issue. In this regard, agents and investigators should be cautioned about the legal "pitfalls" of conducting a "noncustodial, unwarned interrogation" of a civilian suspect. Once a civilian has been arrested or detained beyond an investigative stop, the federal judge is likely to find that any interrogation conducted thereafter is custodial.

An additional problem arises when the civilian suspect at the time of the confession was "...under arrest or other detention in the custody of any law enforcement officer or law enforcement agency...". This confession shall not be ruled inadmissible solely because of a delay in bringing the suspect "before a magistrate or other officer empowered to commit persons charges with offenses against the laws of the United States... if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given... within six hours immediately following his arrest or other detention..." [18 U.S.C. section 3501(c) (emphasis added)]. The judge may consider any confession made after this six hour period to be inadmissible. Then the prosecution has the burden to show the judge that the delay beyond the six hours was based on reasonable transportation problems or distances to the nearest magistrate or other officer. It should be noted that a federal judge in a recent case arising at Ft McClellan did not find that the distances and transportation problems attendant to an arrest of a civilian on post at 0100 hours justified failure to comply with the six hour rule. In order to ensure compliance with this section, agents and investigators should ensure that they have a means of contacting the FBI and U.S. Attorney any time a civilian is arrested and may be tried in federal court. Once contacted, the FBI and U.S. AUSA-on-call can discuss the case with a federal magistrate to determine the best way to comply with this section.

In another civilian interrogation matter, agents and investigators should be aware that all civilian employees of the U.S. government have an additional right during an interrogation. Whether or not the employee is in custody and Miranda applies, this employee may request to have a member of the employee's union present during the interrogation, if the "employee reasonably believes that the examination may result in disciplinary action against the employee..." Title 5 U.S. Code, section 7114(a)(2)(B)(i) and NLRB v. Weingarten, Inc., 420 US 251, 43 L Ed 2d 171, 95 S Ct 959 (1975). The investigator or agent has no affirmative duty to inform the employee of this right, because the Civilian Personnel Officer has the annual responsibility to inform all civilian employees of this right. Title 5 U.S. Code, section 7114(a)(3). However, if the employee requests a union representative, the

investigator or agent must fulfill this request before beginning the questioning. While failure to comply with this request does not result in exclusion of the employee's statement as evidence in a criminal trial, it will likely result in the filing of an unfair labor practice against the military department. The resulting legal actions can be expensive as well as embarrassing for the military service. This situation could result in strained relations between the command, who is embarrassed, and CID or MPI who committed the violation. Therefore, all investigators and agents should be sensitive to this issue when dealing with civilian employees of the U.S. government.

#### PART L - SPONTANEOUS STATEMENTS

Spontaneous Statements. Miranda v. Arizona, 384 US 436 16 L.Ed.2d 694, 86 SCT 1602 (1966), itself held that "there is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

1. In U.S. v. Seeloff, 15 MJ 978 (ACMR, 1983), an individual entered the MP station at 2225 hours, approached the desk sergeant and stated, "I have a personal problem. I have to talk to somebody. I just murdered someone." The individual appeared to be calm, and the police had no report of a violent crime having been committed. The desk sergeant told his clerk to "see if he could render any assistance." The individual then made the following statement to the clerk:

"I screwed her before I strangled her. I never killed anyone before. This is my first time. I shot a few before. I want to be a mercenary. It's pretty neat. If I ever get out of prison, I want to be a mercenary. There's no worry. She is dead. I checked her breathing, and she turned cold and everything. I am a platoon sergeant if that helps any. Did you ever want to kill anyone before?"

Desk Clerk (Answer): "No, I didn't."

Individual (Continuing):

"You should try it. It's fun. My thumbs were getting tired and it takes a long time, but it's all right. I'm glad I came down here. It beats you guys coming looking for me... I'm cool and everything. You look nervous."

Desk Clerk (Answer): "I'm not."

Individual (Continuing):

"I was thinking about being a mercenary. It wasn't so bad. I was holding her down with my hands. It wasn't nothing. I came to you guys. There is no reason why you should come and get me. I was going to be an arsonist. Make a few bucks. Did they find her yet or are they still looking for her?"

Desk Clerk (Answer): "I don't know."

Individual (Continuing):

"...had trouble getting a cab. Maybe she is a lesbian or something, I don't know. Maybe I did right, I don't know. I didn't cut her up. I was looking for a knife. I was going to throw her over the fence or something. I didn't rape her though. She wanted it. I gave it to her... Do you need anything there, you're doing a lot of writing there?"

Desk Clerk (Answer): "No, just writing."

Individual (Continuing):

"Are they going to bring CID over here?"

Desk Clerk (Answer): "Yes, probably."

Individual (Continuing):

"What are they going to do, ship me to Mannheim from here or what?"

Desk Clerk (Answer): "I don't know."

Individual (Continuing):

"You know, killing someone is supposed to make you feel bad but it doesn't make me feel bad. It only took a few minutes, too. She tried to fight me off. If I go back to the company, I'll do another one, SGT Ann Johnson, she's a whore, too. We only got three whores in the company, but now there's only two left. If I don't get them, somebody else will."

2. The statement made by this individual was introduced into evidence against him in the subsequent murder trial. On appeal, the court upheld the conviction, holding that the desk clerk had not interrogated the individual. Instead, there was an "active volunteering, if not compulsion" on the part of the individual to tell what he had done. If anything, it was the individual who was questioning the desk clerk and "trying to engage him in conversation." His statement was, therefore, admissible in evidence, and a sentence of confinement for life was upheld.

3. This is similar to what happened in U.S. v. Willeford, 5 MJ 634 (AFCMR, 1978). There, security police went to pick up a suspect in order to bring him to the Office of Special Investigations (OSI) for questioning. The police knocked on the door to the accused's room. The accused opened the door and blurted out, "I've been expecting you; you've got my wallet; you've got enough on me." The offender had left his wallet at the scene of the rape. The court held that the suspect "on his own account, without prompting or interrogation, made the statement concerning his lost wallet. Such a spontaneous statement, involving neither an interrogation nor request for any statement... does not permit, much less require, a preliminary warning under Article 31."

4. Remember, Article 31 is not triggered unless there is interrogation or a request for a statement. U.S. v. Caliendo, 32 CMR 405 (CMA, 1962). A spontaneous statement involves neither. U.S. v. Workman, 35 CMR 200 (CMA, 1965). Even though it is incriminatory, "a declaration that is spontaneous, rather than the result of action by a person in authority, is not within the exclusionary rule of Article 31." U.S. v. Miller, 7 MJ 90 (CMA, 1979). Article 31 applies when the accused's statements "are not volunteered." U.S. v. Dohle, 1 MJ 223 (CMA, 1975).

5. An interesting case is U.S. v. Rollins, 23 MJ 729 (AFCMR, 1986). The accused was an Air Force recruiter under investigation by OSI for "sexual intimacy with AF applicants." The OSI questioned the accused on 3 July 1985, and questioned one of his victims on 4 September 1985. She told the investigator that the accused had been trying to contact her by telephone for two weeks, but that she had not returned the calls. The OSI investigator persuaded her to call the accused from the OSI office. The agent's instructions to her were not to ask any questions, but to listen to what the accused had to say and repeat what he was saying during the telephone conversation. She did so. She later testified at the trial that the accused "told her some people would be calling her and whatever she did, she should deny everything. He further said he'd helped her with the test, but he was not supposed to do so." At the trial, one of the charges was wrongfully attempting to impede an investigation. The statement made by the accused was introduced into evidence against him.

6. Concerning this statement, the court first held that the victim who talked with the accused "was acting as an agent of the OSI during the telephone conversation." At the same time, however, it further held that "she was not questioning (him). To the contrary, she was returning his telephone calls and attempting to determine why he wished to speak to her." The court concluded:

"Although obviously the OSI was hoping to gain some information in furtherance of its investigation, this, in our view, was not an interrogation which could have triggered the need for a warning... It was a means to facilitate the receipt of a spontaneous statement the appellant wished to make."

7. Here, then, there was no interrogation. It was, instead, "a situation where a suspect on his own initiative made a statement." The rights warnings are not triggered unless there is interrogation. A spontaneous statement lacks this element. As we have seen, as long as the investigator is not conducting an "interrogation, he is not required to interrupt a person who is making a spontaneous statement. In U.S. v. Lovell, 8 MJ 613 (AFCMR, 1979), during a search of a suspect's room, the suspect approached his squadron first sergeant and said, "Chief, can I talk to you?" The response was: "Okay, talk." The suspect then said "I don't know why I did it. I wouldn't have done it if I hadn't been drinking." The court held that this statement "was spontaneous and not prompted by any interrogation."

## PART M - HOW TO HANDLE A NONWAIVER

How to Handle a Nonwaiver. If the suspect says that he wishes to remain silent, his wish must be honored. If he is interrogated anyway, his statement "may not be used in evidence against him." U.S. v. Westmore, 38 CMR 204 (CMA, 1968). The law places a "heavy burden" on the government to establish a "knowing and intelligent waiver." U.S. v. Rogers, 48 CMR 861 (ACMR, 1974). When the subject says he wishes to remain silent, then, the police officer must fully respect his choice. The right to cut off questions must be "scrupulously honored." This does not mean, however, that the individual can never again be questioned. The Supreme Court has held that the police can again contact the suspect, after the lapse of a "significant period" of time. This does not, of course, mean a moment's pause. Michigan v. Mosley, 423 US 96 46LEd.2d. 313 96 Sct 321 (1975) and U.S. v. Watkins, 34 MJ 344 (CMA 1992). Check with JAG before proceeding here. There is no specific point at which a time lapse will be deemed to be "significant."

1. As opposed to simply saying he wishes to remain silent and does not wish to be questioned, a different rule applies when the subject says he wants an attorney. Edwards v. Arizona, 451 US 477 68 L.Ed.2d 378 101 Sct. 1880 (1981), was decided 15 years after Miranda. At the police station, Edwards was advised of his rights, and he said he wanted an attorney. The questioning was stopped and he was taken to a jail cell. At 9:15 A.M. the next morning, two detectives went to the cell and the suspect was told that he had to talk to them. He waived his rights and then confessed. The Supreme Court repeated what it had said in Miranda -- if the suspect says that he wishes to remain silent, the interrogation must cease. If the subject requests an attorney, "the interrogation must cease until an attorney is present."

a. In Edwards, then, the suspect had asserted his right to counsel. The police, without furnishing him an attorney, returned the next morning to confront him and obtained an incriminating statement. The Supreme Court concluded:

"When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation... an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

In other words, the Supreme Court has distinguished between a suspect who simply invokes his right to remain silent, and the suspect who invokes his right to counsel. In the case of the right to counsel, the police must do more than simply stop the interrogation for a "significant" period. They cannot go back to the subject at a later time and interrogate him (even after the lapse of a significant period of time). Further questioning is prohibited unless the suspect initiates it, or unless counsel has been made

available to the suspect. We will examine these concepts in more detail shortly.

b. Edwards, the court concluded that "it is inconsistent with Miranda... for the authorities, at their insistence, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." The court also held that Edwards could have simply changed his mind and chosen to make incriminating statements, prior to his having had access to counsel. There is, of course, nothing in the Fifth Amendment that would prohibit the police "from merely listening to his voluntary, volunteered statements and using them against him at the trial."

c. In Edwards, however, without making counsel available to the suspect, the police returned the next day and interrogated him. This was not done at the subject's request or suggestion. His interrogation "occurred at the insistence of authorities. His statement, made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible." The rule in Edwards, remember, is that "once an accused invokes his right to counsel, he may not be subjected to further interrogation until counsel is made available unless he initiates further communication, exchange, or conversations with the police." This involves two issues. First, did the accused actually invoke his right to counsel? If so, further questioning is proper only if there is a second finding, namely that counsel was either "made available" to the subject or that he himself "initiated the further discussions with the authorities and that he knowingly and intelligently waived the right to counsel which he had previously invoked." U.S. v. Groh, 24 MJ 767 (AFCMR, 1987).

2. The Edwards rule proved difficult to apply: what did "made available" mean once the accused asked for counsel? In Minnick v. Mississippi, 498 US 146, 112LED2d 489 111 S.Ct. 986 (1990), the Supreme Court attempted to resolve the confusion that had surrounded the "made available" portion of the holding in Edwards. The Court held in Minnick that once a suspect invokes the right to counsel afforded by Miranda, he or she may not be interrogated without counsel actually being present at any subsequent government-initiated interrogation -- regardless of whether the accused has consulted with an attorney.

a. In Minnick, the accused was suspected of committing several crimes, including murder, in Mississippi. Four months later, he was apprehended and detained in California. Agents of the FBI sought to interview him in jail in California. Minnick refused to sign a waiver but did agree to answer some of their questions. During the interview, Minnick told the agents that he would make a full statement in a few days when his lawyer was present. The agents ended the interview; however, two days later an investigator from Mississippi sought to talk to Minnick. Minnick declined to sign a written waiver but did agree to talk with the investigator. Statements made by Minnick led to his subsequent prosecution and conviction for murder.

b. The Supreme Court seized Minnick's appeal as an opportunity to establish a "bright-line rule" barring all police-initiated interviews

following an invocation of the right to counsel by a suspect who is in custody. The Minnick court held that nothing short of the actual presence of the accused's attorney will suffice to protect the accused's 5th amendment right to counsel, once invoked.

c. The effect of Minnick on military practice seems broad because military courts have interpreted very liberally the meaning of "custodial interrogation," -- applying both an "official questioning" test and a "position of authority" test. See, e.g., U.S. v. Seay, 1 MJ 223 (CMA 1975) and U.S. v. Dohle, 1 M.J. 223 (CMA 1975).

d. The CID Command has directed a cautious response to Minnick, stating that a suspect who has requested counsel for any offense should not be reinterrogated without the presence of counsel. Investigators should not proceed with questioning of a suspect who has requested counsel for any offense without first consulting with the local trial counsel for guidance.

3. What is meant by "further interrogation?" Edwards held that when a suspect requests counsel, he is not subject to further "interrogation." In U.S. v. Peyton, 10 MJ 387 (CMA, 1981), a CID agent immediately stopped questioning a suspect who said he wanted a lawyer. The agent, however, "allowed the (suspect) to remain in his office while he completed a Criminal Investigation Division (CID) Form 44, which is a personal data card that the CID requires an agent or investigator to complete after interviewing a suspect." The completion of the form did not require the suspect to answer any questions. As the agent was completing the paperwork, the suspect asked him "how serious of an incident this was," and subsequently made incriminating statements.

a. The court concluded that filling out the form was not a violation of the suspect's right to counsel. "The completion of the CID personal data form in the appellant's presence was only a circumstance that is normally attendant to arrest and custody." It was not a form of interrogation. This is similar to the outcome in U.S. v. Roa, 20 MJ 867 (AFCMR, 1985), Aff'd, 24 MJ 297 (CMA, 1987). After the suspect had been apprehended and after he said he wanted a lawyer, the interview was properly terminated. The suspect, however, was asked to consent to a search, which he did. The court held that Edwards prohibited further "interrogation." Consent to a search is not defined as either "interrogation" or a "statement."

b. Compare those cases with U.S. v. Muldoon, 10 MJ 254 (CMA, 1981). There, the suspect said he wanted an attorney. The interview was terminated and the suspect was placed in the detention cell. Meanwhile, the investigators obtained a statement from an accomplice, which implicated the suspect. The agents then returned to the suspect and told him that his accomplice had confessed. They read his entire statement to the accused, who then confessed. On appeal, the court held that this was an "interrogation technique." It was, in fact, "a time-honored technique to elicit a statement -- namely, informing the suspect that he had been implicated by someone else." Since the suspect had been interrogated after he requested an attorney, the police conduct was held to have violated his right to counsel.

c. Suppose the police want to question the suspect about a different crime? This issue was decided by the Supreme Court in U.S. v. Roberson, 486 US 675, 100 LEd2d 704 108 Sct 2093 (1988). The court held that the Edwards rule applied equally to interrogation regarding a separate offense, even if conducted by a different law enforcement officer. It ruled that police have a duty to determine whether or not a suspect has previously requested a lawyer and, if so, to honor that request. The failure to satisfy that duty "cannot be justified by the lack of diligence of a particular officer."

d. In U.S. v. Fassler, 29 MJ 193 (CMA, 1989), the court held that Roberson and its preventive rules are applicable to trials by court-martial. The court stated, "Therefore, regardless of MRE 305(e), a suspect who requests counsel during custodial interrogation may not thereafter be interviewed at the initiative of authorities about any offense." Remember, we are talking about actions of our government. The court did indicate that its ruling did not apply to a request for counsel made with respect to a foreign custodial interrogation and that such did not preclude questioning by American investigators.

e. As a protective measure, guidance from the Judge Advocate General of the Army is that a suspect should be asked, "Have you previously requested a lawyer after being read your rights?" If the answer is "yes" the interrogator should then ask, "When and where?" If the prior rights advisement was within 30 days, the interrogator should consult with the servicing prosecutor to determine if Minnick and Fassler apply. If they do apply, the interrogator may not proceed to question the suspect without having the lawyer actually present. There is an issue of whether Minnick and Fassler apply if the suspect has been released from custody after his first rights advisement and the second rights advisement. The Court of Military Appeals chose not to answer this question directly in U.S. v. Grooters, 39 M.J. 269 (C.M.A. 1994). In that case the accused tried to kill an American civilian whom he believed to have made homosexual advances on him and committed a "homosexual rape" on the accused's fellow soldier. These activities took place in the civilian's quarters in Germany. Before the civilian woke up, the accused poured lighter fluid on the civilian's bed and set it on fire. The civilian awoke and put out the fire, but due to the "embarrassing situation" he declined to report the incident to law enforcement authorities. The accused's fellow soldier did report the "homosexual rape" to CID. CID Agent G. advised the accused of his rights for misprison of a felony which the accused knowingly and voluntarily waived on 29 July 1989. The accused gave a statement recounting the civilian's homosexual advances on him and the "rape" of his friend. He never mentioned setting the apartment on fire. On 8 August 1989, CID Agent G. readvised the accused of his rights for misprison of a felony. This time the accused requested a lawyer. Meanwhile, by late August the civilian had reported the incident because he discovered his wallet had been taken that same time on the morning of the fire in his apartment. He admitted to consensual sodomy and told about waking up with his bed on fire. Also, he reported the theft of his wallet. On 30 August 1989, CID Agent W., who had taken over for Agent G., called in the accused and advised him of his rights for aggravated arson, attempted murder, and larceny. Agent W. asked the accused if he had ever been advised of his rights before for these three

offenses. The accused truthfully answered, "no." Agent W. had the accused's two previous DA Form 3881's including the one whereon he requested counsel in the file. After Agent W. completed the rights advisement, the accused knowingly and voluntarily waived his rights and admitted that he failed to state that he did set the civilian's bed on fire. However, he denied he intended to kill him. He was merely trying to pay him back for his homosexual acts by destroying his property. The Army Court of Military Review (ACMR) found that the accused's statement of 30 August should have been suppressed as a violation of Edwards and Minnick, even though the accused was not in continual custody. He was released from the custodial interrogation setting after his statement on 29 July, placed back in a custodial environment on 8 August, released from custody that same day, and returned to custody on 30 August. Should the Grooters situation arise, investigators should consult the prosecutor before initiating interrogation on different offenses after the suspect had requested a lawyer.

4. When has a suspect requested counsel? The Minnick and Edwards rule is not triggered until the suspect has requested counsel. Remember the case of Connecticut v. Barrett, 479 US 523, 93LEd2d 920, 107 Sct 828 (1987). There, the suspect said that he understood his rights and had no trouble talking about the incident, but said he "would not give a written statement unless his attorney was present." The Supreme Court ruled that the suspect's "limited" request for counsel was "accompanied by affirmative announcements of his willingness to speak with the authorities." His intentions were clear. They were also honored by the police. The suspect had not broadly invoked his right to counsel for all purposes, but simply said he would not make a written statement without an attorney being present. Under such facts, the police could not have sought a written statement from the suspect; indeed, any attempt to have done so would have been improper. A written statement obtained under such circumstances would not have been admissible. The police, instead, merely talked to the individual and obtained an oral statement from the suspect. This is what he said that he was perfectly willing to do.

a. Compare the Barrett decision with the facts in Smith v. Illinois, 469 US 91, 83 L.Ed.2d 488, 10SSct 490 (1984). The issue there was whether the suspect's initial request for counsel was clear and unambiguous. The court explained that the suspect's responses to further interrogation (after he had requested an attorney) "may not be used to cast doubt on the clarity of his initial request for counsel." The questioning in that case went as follows:

QUESTION: "Steve, I want to talk with you in reference to the armed robbery that took place at McDonald's restaurant on the morning of the 19th. Are you familiar with this?"

ANSWER: "Yeah, my cousin Greg was."

QUESTION: "Okay. But before I do that, I must advise you of your rights. Okay? You have a right to remain silent. You do not have to talk to me unless you want to do so. Do you understand that?"

ANSWER: "Uh, she told me to get my lawyer. She said you guys would railroad me."

QUESTION: "Do you understand that as I gave it to you, Steve?"

ANSWER: "Yeah."

QUESTION: "If you do want to talk to me, I must advise you that whatever you say can and will be used against you in court. Do you understand that?"

ANSWER: "Yeah."

QUESTION: "You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that?"

ANSWER: Uh, yeah. I'd like to do that."

QUESTION: "Okay."

Instead of terminating the questioning at this point, however, the police "proceeded to finish reading Smith his Miranda rights and then pressed him again to answer their questions." It went as follows:

QUESTION: "If you want a lawyer and you're unable to pay for one, a lawyer will be appointed to represent you free of cost, do you understand that?"

ANSWER: "Okay."

QUESTION: "Do you wish to talk to me at this time without a lawyer being present?"

ANSWER: "Yeah and no, uh, I don't know what's what really."

QUESTION: "Well, you either have (to agree) to talk to me this time without a lawyer being present, and if you do agree to talk to me without a lawyer being present you can stop me at any time you want to."

ANSWER: "All right. I'll talk to you then."

b. On appeal, the Supreme Court restated the basic rule that once the accused has "expressed his desire to deal with the police only through counsel," he is not subject to further interrogation. The first issue, then, is "whether the accused actually invoked his right to counsel." The court acknowledged that sometimes a suspect's "asserted request for counsel may be ambiguous or equivocal." Here, however, the suspect's statement, "uh, yeah. I'd like to do that," was clear and unambiguous. The only way to find any uncertainty or ambiguity was by looking at the suspect's SUBSEQUENT responses to continued police questioning.

c. In U.S. v. Whitehead, 26 MJ 613 (ACMR 1988), the accused (after being advised of his rights) replied: "Maybe I should get a lawyer." The CID agent

then said, "Well, this is your decision, it's a decision you're going to have to make." After a slight pause, the agent then added: "If you didn't do anything wrong, Ed, you don't need one right?" After another pause, the agent said, "Well?" The suspect then confessed.

d. The court held that this was an equivocal request for counsel. When there is such a statement by the accused, it "is appropriate for the authorities to inquire whether the suspect is electing to speak... reasonable attempts at clarification are appropriate." Here, however, the questioner wasn't attempting to clarify; rather, he "was attempting to dissuade the appellant from the proper exercise of his right to counsel." Where a suspect's response to a rights advisement is unclear, the questioner's "clarification" may not be an argument "about whether having counsel would be in the suspect's best interest or not. Nor may it incorporate a presumption by the interrogator to tell the suspect what counsel's advice to him would be if he were present. Such measures are foreign to the purpose of clarification, which is not to persuade but (is) to discern."

e. Here, then, the questioner tried to persuade the suspect not to seek counsel. This was wrong, and the conviction was reversed.

When the suspect has requested counsel, "all questioning must cease." The request "cannot be dissipated by continued police questioning." A valid waiver of the suspect's rights "cannot be established by showing only that (he) responded to further police-initiated custodian interrogation." In conclusion, then, the court ruled that a suspect's "subsequent responses to continued interrogation cannot be used to cast retrospective doubt on the clarity of the initial request itself."

f. Look at the facts in U.S. v. Hartsock, 14 MJ 837 (ACMR, 1982). The suspect told the CID agent questioning him that "he wanted to consult with a lawyer before being questioned further." The investigator did not, however, immediately terminate the questioning. Instead, he did the following:

"I advised him that there had been a number of people... apprehended and... that after he talked to an attorney, he might want to get back... (to) the prosecutor of the case... and as I put it to him 'cop a plea' or 'make a deal'... as far as his testimony goes."

g. The CID agent also pointed out that "if someone else offered the prosecutor a deal before he did, that person's offer would probably be accepted and no others would be needed." The suspect then made incriminating statements. The court concluded that the suspect had, indeed, clearly requested counsel. The investigator's statements, however, were designed to obtain an incriminating response from the suspect and were designed to induce him NOT to seek counsel. It was the functional equivalent of interrogation, coming after the suspect had clearly asked for a lawyer. Consequently, the conduct of the investigator was improper and the conviction was overturned on appeal.

h. In U.S. v. Alba, 15 MJ 573 (ACMR, 1983), the court explained that when the suspect clearly says he wants a lawyer, the police are "precluded from initiating" further interrogation. In U.S. v. Dillon, 11 MJ 92 (AFCMR, 1981), the suspect said he wanted a lawyer when OSI agents interviewed him. Although the interview was immediately stopped, 50 minutes later the suspect was again advised of his rights and questioned, "before any attempt was made to obtain counsel" for him. This time, however, the suspect waived his rights and confessed. The court ruled that "twice within an hour, while in continuous custody, the accused was advised of his suspect rights and asked if he wished a lawyer. Despite his initial request for a lawyer, he was not afforded counsel prior to the second questioning." The court ruled that "bringing into question the previously asserted right to counsel was unnecessary to ensure that the accused understood his rights." Since he had clearly requested counsel, the subsequent confession was obtained in violation of his rights.

i. In U.S. v. Davis, 36 MJ 337 (CMA. 1993) Aff'd, 114 S.Ct 2350 (1994), the Court of Military Appeals addressed the issue of when a suspect has invoked his right to a lawyer. The accused was suspected of murdering a fellow sailor by beating him to death with a pool cue for his failure to pay a gambling debt. NIS agents properly advised Davis of his rights which he knowingly and voluntarily waived. During the interrogation, the accused denied any involvement in the murder. After about an hour and a half of interrogation, the accused said, "Maybe I should talk to a lawyer." The NIS agent stopped questioning and sought to clarify the accused's intentions. When asked if he wanted a lawyer, he said, "No, I don't want a lawyer." The agent suggested everyone take a short break. The accused got a soda and returned to the interrogation room. The agent reminded the accused of his rights, but did not go through a complete rights advisement. The interrogation continued for about an hour more with the accused making a few incriminating statements. Then he said, "I think I want a lawyer before saying anything else." At this point, the NIS agent ceased questioning and terminated the interview. The Court of Military Appeals held that the accused had not invoked his right to a lawyer when he said, "Maybe I should talk to a lawyer." Further, the agent correctly clarified this ambiguous statement before questioning him further. When the accused said he did not want a lawyer, the agent was free to continue questioning without violating Miranda, Edwards, and Minnick. Also, the agent was careful to remind the accused of his rights after their short break. Finally, when the accused said, "I think I want a lawyer before saying anything else," the agent treated this as a request for an attorney, ceased questioning immediately, and "scrupulously honored" the accused's right to counsel. The United States Supreme Court took this case on appeal on the issue of whether or not the accused's first statement constituted a request for an attorney. The Court held that if a suspect makes an ambiguous or vague request for a lawyer, the police do not have to stop questioning to clarify the ambiguity. "Rather, the suspect must unambiguously request counsel." Basically after the suspect knowingly and voluntarily waives his right to counsel, he has the burden of making a clear request for an attorney before police are obligated to stop questioning. The Court did add that it is the better police practice to clear up the ambiguity as the NIS agent did in this case, but such clarification is not constitutionally required. Therefore, the Supreme Court and Court of Military

Appeals decisions conflict on what a military law enforcement agent should do when a suspect makes an ambiguous remark concerning a lawyer. When confronted with this situation, military investigators and agents should follow the Court of Military Appeals decision and seek clarification from the suspect as to whether or not he wants a lawyer. As with all legal issues, the agent or investigator should seek advice from the servicing prosecutor.

j. In U.S. v. Schroeder, 39 MJ 471 (CMA. 1994), police officers for a civilian railroad saw the accused smoking and snorting what appeared to crack cocaine one night in the railroad yard. They arrested him and told him they were taking him to a civilian hospital for a nonconsensual urinalysis. The accused responded he did not want to give urine until he talked to a lawyer. The police officers said he would not get a lawyer until after the "booking process." Early the next morning after the accused gave urine, an OSI agent came to the county jail to interrogate the accused. Since he was in custody, the agent advised him of his rights under Article 31(b), UCMJ, and Miranda. The agent asked him if he wanted a lawyer. The accused responded, "I will eventually get a lawyer." The agent replied, "What I really need to know is do you want an attorney right now?" The accused rejoined, "No, not right now." Then he signed the waiver and orally confessed to using marijuana and cocaine. The agent used this oral confession to get a search authorization for the accused's dormitory room. Therein the agent found and seized drug paraphernalia. Four days later, the accused was still in county jail. The agent returned to the jail and readvised him of his rights which he waived. Thereafter, the accused gave a written confession. The Court of Military Appeals held that the accused's request for a lawyer prior to going to the hospital to give a urine sample was "premature." The accused does not have the rights to a lawyer under Miranda until he is in custody and he has been advised of his right to counsel. Then he must elect either to invoke or waive this right. In this case, the accused knowingly and voluntarily waived his right to a lawyer. Therefore, his oral and written confessions and the evidence based on his oral confession were admissible, notwithstanding his premature request for a lawyer.

The same rule applies when the suspect requests a lawyer while in custodial interrogation situation with foreign police officials. In U.S. v. Dock, 40 MJ 112 (CMA. 1994), the accused was in the custody of the German Criminal Police who suspected him of a brutal murder of a German cab driver. A U.S. CID agent was present during this interrogation, but acted only as an observer. At some point during the German questioning, the accused stated he wanted an American lawyer from the United States. The German police continued their interrogation of the accused who gave some incriminating oral statements. When the German police were done with the accused, they turned him over to the observing CID agent. This agent properly advised the accused of his rights which he knowingly and voluntarily waived. Thereafter, the accused gave a full oral confession to the murder and followed up the next day by putting this confession in writing. The Court of Military Appeals held that the accused was in exclusive German custody when he requested a lawyer. This request was not binding on the CID agent who was acting only as an observer. This was not a joint investigation. Therefore, the accused's request for a lawyer was premature. When he was fully advised of his rights,

including the rights to a lawyer, he gave up that right knowingly and voluntarily.

5. When has a suspect "initiated" the further conversation? In its Edwards decision, the Supreme Court ruled that once a suspect has asked for a lawyer, he is not subject to further interrogation until counsel is provided UNLESS the suspect himself has initiated the further dialogue, or conversation, with the police. In Wyrick v. Fields, 459 US 42 74 L.Ed.2d 214 86 SCT. 1602 (1982), the suspect was charged with rape. After discussing the case with his lawyer, he asked for a polygraph examination. The CID conducted the examination, after first again advising the suspect of his rights, and obtaining his consent to take the examination. The suspect waived his rights. After being told he had failed the examination, the suspect confessed. On appeal, the Supreme Court ruled that "when the suspect has initiated the dialogue... the right to have a lawyer present can be waived." By requesting the polygraph, the suspect himself had "initiated interrogation." The defense also argued that the police violated the suspect's rights by not AGAIN advising him of his rights before the posttest interview. The Supreme Court disagreed:

"Disconnecting the polygraph equipment effectuated no significant change in the character of the interrogation... it would have been unreasonable for (the suspect) and his attorneys to assume that (the suspect) would not be informed of the polygraph readings and asked to explain any unfavorable results... The questions put to (the suspect) after the examination would not have caused him to forget the rights of which he had been advised and which he had understood moments before."

a. The problem surfaced again in Oregon v. Bradshaw, 462 US 1039 77 L.Ed.2d 405 103 SCT 2830 (1983). There, the questioning was immediately stopped when the suspect said, "I do want an attorney before it goes much further." While the suspect was being transferred to the county jail, however, he asked a police officer, "well, what is going to happen to me now?" The police officer answered: "You do not have to talk to me. You have requested an attorney and I do not want you talking to me unless you so desire because anything you say -- because -- since you have requested an attorney, you know, it has to be at your own free will." The suspect said he understood, and there then followed a "discussion" concerning where the suspect would be taken and the offense with which he would be charged. The police officer suggested that the suspect might help himself by taking a polygraph examination. The suspect "agreed to take such an examination, saying that he was willing to do whatever he could to clear up the matter." The next day, after being again advised of his rights, he was given the examination. He was told he failed, and then he confessed.

b. On appeal, the Supreme Court explained that the question, "well, what is going to happen to me now?" was asked prior to the suspect being subjected to any further interrogation by the authorities. The court explained that Edwards simply held that the suspect is not subject to further interrogation "unless the accused himself initiates further communication, exchanges, or conversations with the police." The rule is designed to protect the accused

"from being badgered by police officers." Here the suspect himself initiated the further conversation. As the court explained:

"There are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to 'initiate' any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation... Such inquiries or statements... relating to routine incidents of the custodial relationship, will not generally 'initiate' a conversation in the sense in which that word was used in *Edwards*."

c. Here, the suspect's question as to what was going to happen to him "evidenced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation." Since the suspect himself had initiated the further conversation, the next issue was whether or not he had waived his rights. The court held that he did, so the resulting confession was admissible.

d. In another case, the suspect was held to have initiated the further conversation when he knocked on the cell door and told the police that he wanted to make a statement. McCree v. Housewright, 689 F.2d 797 (8th Circuit, 1982). The same was true for a suspect who said he wanted to provide information about someone else who he felt should have been arrested. U.S. v. Gordon, 655 F.2d 478 (2d Circuit, 1981).

e. In one case, an MPI agent stopped questioning the suspect, who said that he wanted a lawyer. While the investigator was completing some paperwork, the suspect asked, "how serious of an incident this was." The investigator replied that "recent court decisions had (sentenced) narcotic offenses to the maximum confinement at hard labor for a period not to exceed 10 years." The suspect asked the investigator if he thought that this was a reasonable sentence. The investigator replied that "four years could be a reasonable sentence," but added that he did not make any decisions concerning that. The suspect then said that he did not want to go to jail for "dope that was not his," said he only had one gram, and "began to tell how he and two other soldiers had been to Frankfurt to obtain heroin." The investigator said that he could not talk to the suspect about the incident, since the suspect had asked for a lawyer. The suspect replied that although he had asked for a lawyer, he wanted the investigator "to understand that he did not want to go to jail for dope that was not his." The agent replied "is that right?" and the suspect proceeded to give an account of what had happened. The investigator again said he was obligated to terminate the interview, since the suspect had earlier asked for a lawyer. The suspect replied "that he did not care, that he wanted to tell me about what had happened." The court held that the suspect had initiated the conversation, based on his desire "to aid his cause." The investigator had done nothing wrong: "Even after he has

requested counsel, a suspect can make a voluntary choice to talk to interrogators." U.S. v. Peyton, 10 MJ 387 (CMA, 1981).

6. The problem of successive statement -- imputed knowledge. Edwards has been described as a "bright-line rule." Solem v. Stumes, 465 US 638 79 L.Ed.2d 579 104 Sct 1338 (1984). It is a rule that will be strictly enforced, and the courts are alert to prevent its evasion. A good example of how strict the courts will be in this area is Michigan v. Jackson, 475 US 625, 89LEd2d 631, 106Sct 1404 (1986). There, the suspect said he wanted a lawyer when he was arraigned (advised by the judge of his rights and notified of the charges) on March 23. On March 26, the suspect was interrogated by the police, after having been advised of his rights. The detective in charge of the investigation had been present at the arraignment, but was not present at the later interrogation. The officers who did interrogate the suspect argued that they were not aware of his prior request for counsel, an argument that the Supreme Court termed "unavailing." Since the suspect had clearly asked for a lawyer, the further interrogation was impermissible: "The police cannot simply ignore a defendant's unequivocal request for counsel." The court then explained:

"Sixth Amendment principles require that we impute the state's knowledge from one state actor to another... One set of state actors (the police) may not claim ignorance of defendant's unequivocal request for counsel to another state actor (the court)."

a. Such a situation involves a "confrontation between the state and the individual." The court noted "the police responsibility to know of and respond to such a request" for counsel, and concluded that "if the police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid." The result may be harsh, but the important point is to be aware of the responsibility that it imposes upon the police. A good example of what can happen is U.S. v. Goodson, 22 MJ 22 (CMA, 1986). After the suspect had been apprehended, he asked for an attorney. The military policeman who had apprehended him, however, explained "that all he was going to do was fill out a field interview sheet." The apprehending officer did not interrogate the suspect. After the form was filled out, however, the suspect again asked for a lawyer. The policeman told the suspect that his request for counsel "had been referred" to an MPI investigator. This all happened on 28 February at approximately 0230.

b. At daybreak, the suspect asked "if he could use a telephone to contact a JAG." He was told he could not call the on-duty JAG officer. Due to a large number of persons being questioned, it was not until noon that MPI finally got around to the suspect. The MPI investigator advised the suspect of his rights... and the suspect waived them and confessed. This time, then, the suspect did NOT ask for a lawyer. More importantly, he did not mention the fact that he had previously made not one, but several, such requests.

c. Why didn't the suspect say that he had earlier asked for a lawyer? At trial, he explained that he did not request a lawyer this time because he did not believe he would be able to speak with one "because it was already denied to me, two or three times." In effect, what had happened was that the suspect had, indeed, asked for a lawyer several times. Although the apprehending MP testified that he told MPI of the suspect's request for a lawyer, the MPI agent said he did not remember this. The court concluded that the MPI agent "had been up for a considerable period of time and may either not have heard (the) remark or may have forgotten it." Either way, there was now a serious problem with the case, caused by the fact that the suspect had earlier asked for a lawyer. As the Supreme Court had earlier held, a suspect's later conduct, in response to subsequent interrogation, may not be used to render ambiguous, ineffectual, or unclear his original request for a lawyer. The initial request stands unless the suspect himself initiates further discussion about the offense. The statement to the MPI investigator was ruled inadmissible, since it was obtained in violation of the suspect's rights.

d. Unfortunately, there was even a further problem with the case. Two days after the MPI interview, the suspect had been questioned by his commander, CPT Fox. CPT Fox testified that she knew the soldier had been apprehended, but that she did NOT know that he had (a) made any statement, or (b) asked for a lawyer. Even though she first advised the suspect of his rights, his statement to her was also ruled inadmissible. U.S. v. Goodson, 22 MJ 947 (ACMR, 1986). The commander had questioned the suspect at 1630 hours on 2 March. Before doing so, she had gone to the MP station and read the blotter report. Although, as stated, she did not know the suspect had made any statement, she knew he had been apprehended and was "sure that he was questioned." When CPT Fox advised the suspect of his rights, he did not request a lawyer, or tell her he had previously asked for one; again, he confessed. This is essentially what had happened when he was questioned by the MPI investigator.

e. The court explained the reason for this rule: "The rationale behind imputing knowledge is clear: if the concern of Miranda and Edwards is the prevention of the widespread problems of police violating Fifth Amendment protections, failure to impute knowledge to commanders will provide a ready conduit (means) for by-passing Edwards." As for CPT Fox, she knew the suspect had been involved with the police, and was convinced that he had been questioned. "It certainly would not be overburdensome for a commander in a similar situation to ask the suspect if he had previously requested counsel... Additionally, the military police were at least negligent in failing to inform CPT Fox that counsel had been invoked." The court would not penalize the suspect for the government's failures. Indeed, the court noted that the fact that counsel had been requested could "be easily noted on the MP blotter." Such a "simple procedure" could have solved the problem.

f. The problem also came up in U.S. v. Reeves, 20 MJ 234 (CMA, 1985). There, the CID agent advised the suspect of his rights and the suspect asked for a lawyer. The interview was immediately stopped and the suspect was released to the military police, to be taken to the stockade. The CID agent did not mention to the military police the fact that the suspect had asked for

a lawyer, "because no one was going to interview him again." Later that day, however, the accused's commander went to the stockade to talk with the suspect. The commander read the soldier his rights, and the soldier made no request for counsel. Nor did the soldier mention the earlier conversation with the CID agent wherein he HAD asked for an attorney. Instead, the soldier waived his rights and confessed to his commander.

g. Here, then, the soldier had originally made a clear request for a lawyer. The government was not, then, free to interrogate him further. Again, a suspect's response to later interrogation (after he had requested the attorney) may not be used to cast doubt or uncertainty upon his original request for a lawyer. To rely on the suspect's failure to repeat his earlier request for counsel would involve "the same sin" the courts had previously condemned. The case, then, was sent back to the lower court. The lower court (Army Court of Military Review) first held that Edwards does apply "to discussions with military commanders." Also, the suspect had not initiated the conversation with his commander. The CID agent "was at least negligent in failing to notify either the military police or (the suspect's commander) that (the suspect) had requested to consult with counsel." The CID agent "should have recognized that someone else might attempt to question" the suspect. The agent's testimony that he thought nobody else would attempt to question the suspect was viewed as "incredible." The confession to the commander was, then, inadmissible. U.S. v. Reeves, 21 MJ 768 (ACMR, 1985). There is no exception for questioning by the accused's company commander, U.S. v. Brabant, 27 MJ 899 (AFCMR, 1988).

h. Again, the court decisions impose a responsibility upon the government. Those who question the suspect must understand that responsibility, and act accordingly. To ignore what may have happened earlier in a case is to act at one's peril. The investigator who neglects to find out what happened earlier in a case may create an unnecessary mass of confusion which the courts will later have to untangle. The same is true for the initial investigator who fails to communicate with those who come after him. A classic example of what can happen is U.S. v. Harris, 16 MJ 562 (ACMR, 1983).

i. The issue arose on July 8, 1981, when 45 plastic baggies containing 150 grams of marijuana were found among a soldier's possessions during a health and welfare inspection. The military police were called and arrived at the unit to apprehend the soldier. When he was advised of his rights, the soldier asked for an attorney. The military police then transported the suspect to the MP station, where he remained in custody "awaiting interrogation by investigators of the Joint Drug Suppression Team (JDST)." The MP, "for reasons unexplained," did not advise the JDST agents of the suspect's request for an attorney. Instead, about three hours later, the JDST agents began to interview the suspect. They advised him of his rights and he agreed to make a statement. One of the JDST agents testified that "I specifically asked him during the rights advisement if he had been advised of his rights by the military police and requested a lawyer, and he replied no." At any rate, this time, the suspect waived his rights and made a statement denying guilt. The JDST agents did not believe the suspect, so they brought

in the "senior investigator of the JDST to continue the interview." He, too, was unaware of the suspect's original request for counsel, but did determine that the suspect had been advised of his rights by the other JDST teams, had understood them, and that the suspect still wished to make a statement without legal counsel being present. When questioned by this individual, the suspect now confessed.

j. The first stage of the battle was the appeal to the Army Court of Military Review (ACMR). The issue was whether the JDST interrogation was in violation of the suspect's request for counsel. The court explained that a suspect could countermand his request for counsel and change his mind. Under the facts of this case, the court held that the suspect was subjected "to a subsequent interrogation by JDST agents without counsel being present." The subject had clearly asked for an attorney, and had obviously not initiated the subsequent interrogation by the JDST agents. The question, however: had the subject, by his own actions, waived his earlier request for counsel? The purpose of the Edwards rule, again, was to prevent the police from wearing down the suspect through repeated confrontations. The court said, then, that Edwards would not apply "to keep evidence given to the police by an accused who has, by his own affirmative action, countermanded an earlier request for counsel."

k. The court then concluded that "well-meaning JDST agents acted with care and circumspection in an attempt to ensure that appellant's rights were not violated. Having no knowledge of appellant's earlier request for counsel, they advised him of his rights and specifically asked him if he had previously requested counsel from other police officers. Upon receiving his negative reply, they proceeded to interrogate him." Here, the court held that there was more than mere "good faith." The suspect "lied to the JDST agents about his prior request for counsel... Its effect was to prevent the JDST agents from obtaining counsel for him." If the suspect did not obtain the services of counsel, "it was because of his own voluntary, knowing, and intelligence act, rather than because the police subtly induced him to change his mind." By his actions, then, the suspect had "countermanded his original request for counsel." The government won round one of the battle, and the confession was ruled admissible. The war, however, raged on.

l. The case next went upon appeal to the Court of Military Appeals (COMA). In U.S. v. Harris, 19 MJ 331 (CMA, 1985), the issue was, again, the admissibility of the suspect's confession. The court explained that the MP who originally apprehended the suspect had decided to contact CID due to the quantity of contraband that had been found. The MP testified in court that "the military police would work with the MPI and the CID, so that they become one law enforcement agency working together." The MP also testified that he "did not recall" whether or not he had informed CID of the suspect's initial request for a lawyer, but said that he had not himself tried to call a lawyer for the suspect. The court further held that the JDST investigators had talked to the MP who apprehended the suspect. The suspect did not request a lawyer when the JDST agents advised him of his rights, and the JDST investigators were not aware of the suspect's earlier request for an attorney. One of the investigators, you will recall, testified that he had specifically

asked the suspect if he had been advised of his rights by the military police, and the suspect replied that he had NOT. The JDST investigator who said this also testified that had the suspect answer "yes," the investigator would then have gone to the military police and gotten the Rights Waiver Certificate. The court further explained that when the JDST agents were unsuccessful in obtaining a confession, they called in the senior JDST agent, who was the CID operations officer. He asked the other JDST investigators and found out that they had advised the suspect of his rights. He did not ask how many times the suspect had previously been so advised by anyone else, and "was unaware of any previous request by appellant for an attorney."

m. The court saw a problem with the case: "Bringing Harris in for an interview without honoring his request for the counsel to which he was entitled" was a violation of the rule that further interrogation was prohibited. The JDST agents "were not free to interview Harris after his request for counsel unless he initiated a discussion with them." The court explained that Edwards applied "even though the interrogator knew nothing about the previous request for counsel and was acting in good faith." The fact that the investigators were unaware of the suspect's earlier request for counsel was "irrelevant." The fact that the suspect had requested the lawyer when questioned by the military policeman (as opposed to MPI or CID) was likewise irrelevant. The Edwards rule applies "even when the request for counsel was made to someone of a police agency entirely different from that of the interrogator... Once a suspect has invoked the right to counsel, knowledge of that request is imputed to all law enforcement officers who subsequently deal with the suspect." The courts fear that a contrary rule "would encourage circumvention" of the law. The court then explained that "law enforcement officers should be discouraged from violating the accused's constitutional rights by failing to ascertain or advise one another whether those rights had been previously asserted. The official conduct was at least negligent."

n. What about the suspect's negative response when the JDST investigator asked him if he had previously been advised of his rights? The court explained that, based on actual or constructive knowledge of the suspect's initial request for a lawyer, "he never should have brought Harris to the interview room before providing him with a lawyer. In that event, the request for counsel should not be (overcome) by a conversation which should not have taken place after the request had been made." The court also held that there was a possibility "that Harris misunderstood the question asked or that (the agent) misunderstood the reply." The suspect might have thought the questioner was asking if he had been previously advised of his rights from a certificate, or was only asking if MPI had previously advised him. It was to avoid these possibilities for misunderstanding that the "bright-line" rule in Edwards was established. The rule is designed to provide "certainty of result" and prevent confusion of the issues. The court reversed the lower court, and sent the case back to the trial level for a determination of the factual issues.

o. The conclusion of the lower court was that the JDST investigator did NOT really ask the subject if he had previously been advised of his rights. What was left, then, was a "failure of communication" between the original MP

and the JDST investigators. It was a failure that was "unreasonable and should have been and could easily have been prevented." After having clearly requested a lawyer, the suspect had been subjected to further interrogation. The case then went back to the Court of Military Appeals, and the confession was ruled inadmissible. U.S. v. Harris, 21 MJ 173 (CMA, 1985). Consequently, the investigator must act with caution in this area. There are, of course, cases where the subsequent investigators would have no possible way of knowing what had happened earlier in a case. As an example, the original police officer may have died. Barring unusual circumstances, however, the courts will strictly apply the Edwards rule. Do not gamble on the chance that the courts will find some exception to it. Be sure to act carefully, and avoid any possibility that the courts will label your conduct "negligent."

7. When has counsel been "made available?" The bright line rule, is once an in-custody suspect has requested counsel, all questioning must cease until counsel is actually present. See Minnick, discussed above in PART L, "How to Handle a Nonwaiver."

#### PART N - PRESENCE OF COUNSEL/RIGHT TO COUNSEL

1994 Amendments to the Military Rules of Evidence deleted the old MRE 305(e), Notice to Counsel, in its entirety. Further, the frequently cited court-martial case of U.S. v. McOmber, 1 MJ 380 (CMA, 1976), regarding notice to counsel requirements imposed on law enforcement officers is no longer valid law and should not be followed.

MRE 305(e) was renamed Presence of Counsel and was amended to conform military practice with the Supreme Court's decisions in Minnick v. Mississippi, 498 US 146 (1990) and McNeil v. Wisconsin, 501 US 171 (1991). MRE 305(e) was subdivided to distinguish between the right to counsel under the Fifth Amendment (custodial interrogation) and Sixth Amendment (post-preferral interrogation). MRE 305(e)(1) requires, if an accused during custodial interrogation requests counsel, counsel must be present before any subsequent interrogation may proceed. MRE 305(e)(2) provides that if an accused during a post-preferral interrogation requests counsel, counsel must be present before any subsequent interrogation concerning that offense may proceed.

In Minnick, the Supreme Court determined that the Fifth Amendment right to counsel protected by Miranda v. Arizona, 384 US 436 (1966) and Edwards v. Arizona, 451 US 477 (1981), as interpreted in Arizona v. Roberson, 486 US 675 (1988), requires that when a suspect in custody requests counsel, interrogation shall not proceed unless counsel is present. Government officials may not reinitiate custodial interrogation in the absence of counsel whether or not the accused has consulted with his attorney. Minnick, 498 US at 150-152. This rule does not apply, however, when the accused or suspect initiates reinterrogation regardless of whether the accused is in custody. Minnick, 498 US at 154-155; Roberson, 486 US at 677.

MRE 305(e)(2) follows McNeil and applies the Sixth Amendment right to counsel to military practice. Under the Sixth Amendment, an accused is

entitled to representation at critical confrontations with the government after the initiation of adversary proceedings. In accordance with McNeil, the amendment recognizes that this right is offense-specific and, in the context of military law, that it normally attaches when charges are preferred. See U.S. v. Jordan, 29 MJ 177, 187 (CMA, 1989); U.S. v. Wattenbarger, 21 MJ 41 (CMA, 1985), cert. denied, 477 US 904 (1986). MRE 305(e)(2) supersedes the prior notice to counsel rule. The prior rule based on U.S. v. McOmber, 1 MJ 380 (CMA, 1976), is not consistent with Minnick and McNeil. Despite the fact that McOmber was decided on the basis of Article 27, UCMJ, the case involved a Sixth Amendment claim by the defense, an analysis of the Fifth Amendment decisions of Miranda v. Arizona, 384 US 436 (1966), and U.S. v. Tempia, 16 USCMA 629, 37 CMR 249 (1967), and the Sixth Amendment decisions of Massiah v. U.S., 377 US 201 (1964). Moreover, the McOmber rule has been applied to claims based on violations of both the Fifth and Sixth Amendments. See, e.g., U.S. v. Fassler, 29 MJ 193 (CMA, 1989). Minnick and McNeil reexamine the Fifth and Sixth Amendment decisions central to the McOmber decision; the amendments to MRE 305(e) are the result of that reexamination.

Commanders and law enforcement officers must also be aware of and understand MRE 305(g)(2)(B) which is a new rule and provides that an accused's waiver of the Fifth Amendment right to counsel, after having previously exercised that right at an earlier custodial interrogation is presumptively invalid, unless the government can demonstrate that: 1. The accused initiated the communication leading to the waiver, or 2. The accused's freedom has not been restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver. The new MRE 305(g)(2)(B) conforms the military practice with the Supreme Court's decision in Minnick v. Mississippi, 498 US 146 (1990). In that case, the Court provided that an accused or suspect can validly waive his Fifth Amendment right to counsel, after having previously exercised that right at an earlier custodial interrogation, by initiating the subsequent interrogation leading to the waiver. *Id.* at 156. This is reflected in MRE 305(g)(2)(B)(i). MRE 305(g)(2)(B)(ii) establishes a presumption that a coercive atmosphere exists that invalidates a subsequent waiver of counsel rights when the request for counsel and subsequent waiver occur while the accused or suspect is in continuous custody. See McNeil v. Wisconsin, 501 US 171 (1991); Arizona v. Roberson, 486 US 675 (1991). The presumption can be overcome when it is shown that there occurred a break in custody which sufficiently dissipated the coercive environment. See U.S. v. Schake, 30 MJ 314 (CMA 1990).

In U.S. v. Vaughters, 42 MJ 564 (AFCCA, 1995), interrogation initiated by Air Force OSI agents after accused had requested counsel during an earlier interview did not violate accused's right to counsel where accused was released from custody immediately after he requested to speak with an attorney, and he did not contact an attorney for assistance with the accusation for the next 19 days, despite being on an Air Force installation on which two military defense counsel were located. During the 19 day period, accused was neither in custody nor subject to any other conditions on liberty. Further, he was not subjected to any badgering by police. Despite these facts, he did seek the assistance of counsel. The Air Force Court stated that they did not believe that the Supreme Court meant to find an accused in SSgt

Vaughters' position to be under such "inherently compelling pressures" as to need any special protection. They found that the AFOSI-initiated interrogation of SSgt Vaughters after this passage of 19 days did not violate his right to counsel. Accused's subsequent waiver of rights and confession were proper and legally admissible according to the Air Force Court.

MRE 305(g)(2)(C) is also new and conforms military practice with the Supreme Court's decision in Michigan v. Jackson, 475 US 625, 636 (1986). In Jackson, the Court provided that the accused or suspect can validly waive his or her Sixth Amendment right to counsel, after having previously asserted that right, by initiating the subsequent interrogation leading to the waiver. The Court differentiated between assertions of the Fifth and Sixth Amendment right to counsel by holding that, while exercise of the former barred further interrogation concerning the same or other offenses in the absence of counsel, the Sixth Amendment protection only attaches to those offenses as to which the right was originally asserted. In addition, while continuous custody would serve to invalidate a subsequent waiver of a Fifth Amendment right to counsel, the existence or lack of continuous custody is irrelevant to Sixth Amendment rights. The latter vest once formal proceedings are instituted by the State and the accused asserts his right to counsel, and they serve to ensure that the accused is afforded the right to counsel to serve as a buffer between the accused and the State.

#### PART O - THE VOLUNTARINESS STANDARD

1. General. Even if a suspect has been advised of his rights and has waived them, any statement that he makes must still be voluntary in order to be admissible. A statement is "involuntary" if it has been obtained in violation of the Fifth Amendment/Article 31 "or through the use of coercion, unlawful influence, or unlawful inducement" (MRE 304(c) (3)). In other words, simply because you have advised the suspect of his rights and he has waived them, this does not mean that you can now do, literally, anything that you want to. There are still limits, and you need to know what they are. The issue is whether the interrogator's actions are such "as to overbear the defendant's will to resist, and bring about confessions not freely self-determined." U.S. v. St. Clair, 19 MJ 833 (NMCMR, 1984). In Miller v. Fenton, 474 US 104, 88LEd2d 405, 106Sct 445 (1985), the Supreme Court stated that "certain interrogation techniques, either in isolation or as applied to the unique circumstances of a particular suspect, are so offensive to a civilized system of justice that they must be condemned." Confessions that have been obtained "by means revolting to the sense of justice" are not admissible.

#### 2. Coercion (the negative influences).

a. A classic case is Beecher v. Alabama, 389 US 35, 19 L.Ed.2d 35, 88 Sct 189 (1967). The defendant was suspected of rape and murder in Alabama. Shot in the leg while running into an open field in Tennessee a confession was obtained in the following manner:

"The local chief of police pressed a loaded gun to his face while another officer pointed a rifle against the side of his head. The

police chief asked whether he had raped and killed a woman. When he said that he had not, the chief called him a liar and said, 'If you do not tell the truth, I am going to kill you.' The other officer then fired his rifle next to the (suspect's) ear and the (suspect) immediately confessed."

Later the suspect was given an injection to ease the pain of his wound. The Police Chief told him to sign the extradition papers which would send him back to Alabama or he could be killed by a "gang of people" waiting for him. After "signing" these papers, the suspect was returned to Alabama where he was placed in a prison hospital. Five days after he returned to Alabama, his leg was swollen and infected. He had a high fever and was given a morphine shot every four hours to ease the pain. Alabama investigators came to the hospital to interview him an hour after he had received a morphine injection. Prior to this interview, a medical assistant told the suspect to cooperate with these investigators. Also, this assistant told the investigators in the suspect's presence to let him (the assistant) know if the suspect did not tell them what they wanted to hear. After a 90 minute "conversation" with the suspect, the investigators prepared two detailed written confessions consistent with his admissions to authorities during the earlier "field interview." The suspect signed both confessions while "(s)till in a 'kind of slumber' from his last morphine injection, feverish, and in intense pain." The Alabama Supreme Court ruled that the statement taken at gun point was coerced, but the two statements taken at the hospital were voluntarily obtained and admissible at his trial. The U.S. Supreme Court reversed the second holding when they found those confessions involuntarily obtained as the "product of gross coercion."

b. The issue arose again in Mincey v. Arizona, 437 US 385, 57 L.Ed.2d 290 98 Sct 2408 (1978). The suspect had been shot and was questioned while he was in the hospital. The confession was obtained in the following manner:

"Tubes were inserted into his throat to help him breathe, and through his nose into his stomach; a catheter was inserted into his bladder. He received various drugs, and a device was attached to his arm so that he could be fed intravenously... At about eight o'clock that evening (a police officer) came to the intensive care unit to interrogate him. Mincey (the suspect) was unable to talk because of the tube in his mouth, and so he responded to (the) questions by writing answers on pieces of paper provided by the hospital."

Although the suspect "asked repeatedly that the interrogation stop until he could get a lawyer," the police officer "continued to question him until almost midnight." A nurse who was present "suggested it would be best if (he) answered the police officer's questions." The questioning stopped only during brief periods when the suspect lost consciousness. On appeal, the Supreme Court reversed the conviction:

"It is hard to image a situation less conducive to the exercise of a rational intellect and a free will... He complained... that the pain in his leg was unbearable... he was lying on his back on a hospital bed,

encumbered by tubes, needles, and breathing apparatus. He was, in short, at the complete mercy of (the police officer), unable to escape or resist... In this debilitated and helpless condition, (he) clearly expressed his wish not to be interrogated... the statements at issue were thus the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness."

The confession, then, was "not the product of his free and rational choice." Instead, "weakened by pain and shock... his will was simply overborne."

c. Townsend v. Sain, 372 US 293, 9 L.Ed.2d 770 83Sct 745 (1963) involved a suspect who had been injected by the police physician with "truth serum." The Supreme Court explained that a confession "which is not the product of a free intellect" is not admissible. Under the facts of this case, the court stated that "it is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary than when brought about by a drug having the effect of a truth serum."

d. In Ashcraft v. Tennessee, 322 US 142 88 L.Ed. 1192 64 Sct 921 (1944), the suspect was questioned from 7:00 P.M. Saturday evening until 9:30 A.M. Monday morning (when he finally confessed). Although the police said that they had given him a five-minute break during that period, the Supreme Court was not impressed, and reversed the conviction, explaining:

"We think a situation such as that here shown... is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear. It is inconceivable that any court of justice in the land, conducted as our courts are... would permit prosecutors serving in relays to keep a (suspect) under continuous cross-examination for 36 hours without rest or sleep in an effort to extract a 'voluntary' confession."

e. In Brooks v. Florida, 389 US 413, 19 L.Ed.2d 643 88 Sct 541 (1967), the suspect had been confined in a cell with no window, bed, furnishings, or facilities, for 14 days. His diet was "peas and carrots in a soup form," which was given to him three times a day in four-ounce servings. He also was given eight ounces of water a day. He was stripped naked before being thrown into the cell. On the 15th day, he was taken from the cell and questioned. The court held the confession to be involuntary, labeling it "a shocking display of barbarism." A somewhat similar situation occurred in U.S. v. O'Such, 37 CMR 157 (CMA, 1967). The suspect was confined "in a box, more or less," stripped to his underwear. The box was "seven feet, five inches in depth and four feet, ten inches wide." The only furniture was a wooden board, which was "a section out of a bowling alley." At night, "a flashlight was... played on him at five-minute intervals." He could not lie down "between reveille and retreat." He was so confined for several days. The court held his subsequent confession to be involuntary, a product of coercion.

f. In U.S. v. Howard, 39 CMR 252 (CMA, 1969), the accused argued that the use of the "Mutt and Jeff" technique was illegal. This is, of course, the "hot and cold" approach, using one friendly interrogator, and one who is harsh and unfriendly. The court held that using an interrogation technique "stressing differences in personality and attitude between the agents" is not coercive. The court also ruled that "when the suspect has been advised of his rights and has clearly indicated he understands his rights and is willing to answer questions, it is patently not coercion within the meaning of Article 31 to advise him of the available evidence against him... it is not coercion within the meaning of Article 31 for an agent to tell an accused, who has consented to interrogation, of the probable legal consequences of the information known to the police."

g. The determination of voluntariness is made on the basis of "totality of the circumstances," and includes an analysis of the "background and character of the individual being questioned." The mere passage of eight hours, for example, was not coercive per se. The courts, rather, will look at all of the facts. This includes "the conduct of the investigators and whether it was "overbearing." Also, "the fact that a person is easily led or of low mentality does not per se render any confession by him inadmissible. In such a situation, a confession may be coerced, and hence involuntary, with application of far less coercion than might be necessary to compel the confession of a strong-willed individual." U.S. v. Jones, 6 MJ 770 (ACMR, 1978).

h. It is clear, then, from the cases just examined that the use of physical brutality will render a confession inadmissible. This includes not only the actual use of force, but its threatened use. Such actions on the part of the police are viewed as overwhelming the individual's free will, and depriving him of any capacity to choose what to do. The courts fear that such confessions are inherently unreliable. If you point a gun at someone and threaten to shoot him unless he confesses, you are quite likely to get a confession from him -- he will confess to the crime under investigation, and any other crime you want him to confess to. This is not necessarily because what he is saying is true, but it may be simply because he does not want to be shot. Such confessions, then, are simply not reliable.

i. Apart from the use of physical brutality, the cases just examined make it equally clear that confessions obtained through deprivations of an individual's sleep are equally inadmissible. Again, someone who is deprived of sleep for a long enough period of time will undoubtedly confess to the assassination of President Lincoln. These confessions, then, are equally unreliable. Such interrogation techniques are likely to overcome an individual's free will, and are likely to procure confessions from suspects who are innocent, as well as guilty.

j. An interesting case is U.S. v. Wheeler, 22 MJ 76 (CMA, 1986). Cert denied 479 US 827, 93LED2d 55, 107 SCT 106 (1986). After he was advised of his rights, the suspect waived them and denied committing the offense. The investigator then did the following:

"I basically appealed to his conscience, and told him that I didn't believe his stories that he'd been giving us up until then, and he at first denied any involvement, and then he said he'd been praying to God a lot about his problem, and that was the first kind of admission that he gave me at all... and, at that point, I said, 'Yes, I know that you have a problem and God knows that you have a problem.' Tears welled in his eyes, and he continued saying things to the effect that he'd been praying a lot about it, and I said, 'Would you be willing to pray to God right now to give you the strength to go ahead and get this off your chest and start living your life and turning your life around?' I got down on my knees with him and he was crying there, and he turned his head upward and said, 'I didn't mean to do it. I didn't mean to attack those women. God, I need help and strength.' And that lasted 30 seconds or so. We got back in our chairs and he drew his strength back up again and stopped crying, and looked at me and said, 'You're right. What you said was true. I did do it.'"

k. The court held that appeals to one's religious beliefs are not per se coercive. It was simply an "appeal to his conscience." A confession motivated by one's religious beliefs "is neither unreliable nor involuntary... Where the appeal to religious beliefs amounts to no more persuasion to the defendant than the usual (appeal) to speak the truth, no improper inducement occurs." The investigator's conduct here, then, did not cross the line between interrogation and intimidation.

1. Two recent Navy cases illustrate instances where Navy investigators overstepped the bounds of voluntariness required for admission of an accused's confession. In U.S. v. Sennett, 42 MJ 787 (NMCCA, 1995), statements obtained as a result of military investigators threatening to deprive an accused of liberty unless he cooperates are not voluntary and are therefore inadmissible. In U.S. v. Doucet, \_\_\_\_ MJ (NMCCA, 1995), the government failed to carry its burden of proving the accused's written confession was voluntary where the accused was a relatively junior inexperienced Marine who had a learning disability and was easily led. At the time he signed the statement, he had been subjected to over 7 hours of interrogation as well as three previous interrogation sessions. Prior to signing the statement, accused expressed that the words in the statement were not his and that he did not desire to adopt them as his own until he had a chance to look them over at home. The agents overcame his will through 15-20 minutes of intense, two-on-one interrogation following his clear request.

m. Overall, the issue is whether the suspect's will has been overborne, i.e., has he been deprived "of that freedom of will essential to the voluntariness of his confession?" U.S. v. Askew, 34 CMR 37 (CMA, 1963). Telling the suspect that his wife would not have to be questioned if he confessed resulted in the suppression of a confession. The court held that it "cannot condone the making of such an illicit bargain with a suspect or accused in order to obtain his statement. Confessions, when motivated by promises to leave one's wife alone, are simply not the product of a free and unfettered choice between speaking and remaining silent." The courts will look at all of the circumstances, including the length, duration, and nature

of the interrogation. U.S. v. Houston, 35 CMR 211 (CMA, 1965). Also, "the mere fact (that) the accused was in custody or confinement at the time of giving the statement does not render it inadmissible." U.S. v. Vigneault, 12 CMR 3 (CMA, 1953).

n. In Lynumn v. Illinois, 372 US 528 9 L.Ed.2d 922 83 SCT 917 (1963), the defendant confessed after the police told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not cooperate. The confession was held to have been coerced, and therefore involuntary. Her will had been overborne and the confession was not the product of a rational intellect and free will. An unusual situation arose in Colorado v. Connelly, 479 US 157, 93LEd2d 473, 107 SCt 515 (1986). The defendant had approached a police officer in downtown Denver and "without any prompting, stated that he had murdered someone and wanted to talk about it." The police officer advised the suspect of his rights, and the individual then confessed. He then took the police to the scene of the killing. The suspect was then held in jail overnight. The following morning, he became "visibly disoriented" and said that "voices" had told him to confess. He was examined by a psychiatrist, who stated that the suspect was psychotic and had been obeying "command hallucinations." In other words, he had been following orders from God. The defendant argued at trial that this, therefore, made his confession involuntary. The Supreme Court disagreed, and held that "coercive police activity is a necessary predicate (element) to the finding that a confession is not voluntary... Respondent's perception of coercion flowing from the 'voice of God' however important or significant such a perception may be in other disciplines, is a matter to which the United States Constitution does not speak." Here, the police had not engaged in any physical or psychological coercion. The confession was found to be voluntary, in that it was not the product of any misconduct by the police.

3. Unlawful inducements (the positive influences). A confession is also involuntary and inadmissible if it is the product of an unlawful inducement. This is the situation where the questioner makes an offer "too good to be true" and therefore causes the suspect to make a confession. Such confessions are not reliable, since the suspect may be confessing not because he is guilty, but simply to get the benefit of the bargain.

a. In U.S. v. Tanner, 34 CMR 227 (CMA 1964). The court held if the investigators obtained the statement "by bluntly threatening him with severe punishment at the hands of the civil authorities if he did not confess, as opposed to promising avoidance of prosecution altogether if he did cooperate." His statement was involuntarily obtained. The court also held that "if an accused is promised immunity from prosecution in return for a confession to a crime, such would... operate to deprive him of the mental freedom to choose either to speak or to remain silent, and thus render his statement involuntary." U.S. v. Dalrymple, 34 CMR 87 (CMA 1963). A confession, then, is not voluntary if the accused confessed because of repeated assurances his case was not to be prosecuted.

b. Similarly, "if an accused is led to understand that a confession or admission will not be used against him, such promise constitutes unlawful

inducement, destroys the effect of properly given advice under Article 31, and renders the statement inadmissible." U.S. v. Collier, 49 CMR 719 (AFCMR, 1975). If an accused is promised immunity from prosecution in return for confessing, the confession will not be admissible. U.S. v. Churnovic, 22 MJ 401 (CMA, 1986). It is not, however, improper for an investigator to tell the suspect that he (the investigator) "would notify the authorities of his cooperation." U.S. v. St. Clair, 19 MJ 833 (NMCMR, 1984).

4. Police deception. Once a suspect has waived his rights and has agreed to talk to the authorities, it is important to look at the validity of certain interrogation techniques. The use of deception "is not impermissible as long as the artifice was not designed or calculated... to produce an untrue confession." U.S. v. McKay, 26 CMR 307 (CMA, 1958). Fraud and deceit are improper "only when the nature of the fraud or deceit is calculated to elicit an untrue statement." U.S. v. Gibson, 14 CMR 164 (CMA, 1954). The mere use of deception, then, is not improper. U.S. v. Davis, 6 MJ 874 (ACMR, 1979). Remember, however, that we are speaking of interrogation techniques that are used AFTER the suspect has been properly advised of his rights, and he has voluntarily agreed to talk to the authorities. Do not, under any circumstances, commit fraud or deceit while you are advising a suspect of his rights. Any deceit at this point will result in a defective rights advisement and an inadmissible confession.

A good example is U.S. v. Melanson, 15 MJ 765 (AFCMR, 1983). The suspect "was tricked into believing film existed" and "that his criminal activities (had) been recorded on film." The court ruled that "a trick or artifice which has no tendency to produce a false confession is a permissible weapon in the interrogator's arsenal." The court said that it was similar to "misrepresenting that (a) murder weapon had been found," "that fingerprints found at a crime scene matched the accused," and that the suspect's fingerprints "had been found on (a) blood-covered knife." In Frazier v. Cupp, 394 US 731, 22 L.Ed.2d 684 89 Sct 1420 (1969), the suspect was falsely told that his associate had confessed. The Supreme Court held that the police "misrepresentation" did not, standing alone, make the confession inadmissible.

#### PART P - THE PUBLIC SAFETY EXCEPTION

1. In U.S. v. Seeloff, 15 MJ 978 (ACMR, 1983), an individual walked into the KP station at 2225 hours, and said, "I have a personal problem. I have to talk to somebody. I just murdered someone." An MP asked him where the body was. Although the case was not decided on this point, the court held that the investigator "felt he needed to get this information in the event there was someone thought to be dead, but who was only injured and in need of help."

2. The same issue reached the U.S. Supreme Court a year later. The police chased a rapist into a supermarket. The victim said that the attacker had a gun. When he was apprehended inside of the store, however, the suspect's holster was empty. A police officer asked him where the gun was. The court concluded that Miranda warnings were not necessary, and that the suspect's response (and the gun) were admissible. The court explained that "overriding considerations of public safety justify the officer's failure to provide

Miranda warnings before he asked questions devoted to locating the abandoned weapon... concern for public safety must be paramount to adherence to the literal language of Miranda." Here, the police "were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than a danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it." The court concluded:

"In such a situation, if the police are required to recite the familiar Miranda warnings before asking the whereabouts of a gun, suspects in Quarles' position (the name of the defendant) might be deterred from responding. The cost would have been something more than merely the failure to obtain the evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles, but to ensure that further danger to the public did not result from the concealment of the gun in a public area."

3. The question the police officer asked, then, was not designed "solely to elicit testimonial evidence from a suspect," but was "necessary to secure their own safety or the safety of the public." New York v. Quarles, 467 US 649, 81 L.Ed.2d 550 104 Sct 2626 (1984). Under these facts, then, Miranda warnings were not necessary. The military courts confronted this problem in U.S. v. Jones, 19 MJ 961 (ACMR, 1985), aff'd, 26 MJ 353 (CMA, 1988). A suspect said that he stabbed someone. Without advising him of his rights, the police asked him where the body was, and where the victim had been stabbed. The court cited the public safety issue, and applied it to what it saw as a "rescue" situation. Two factors had to be present in order for the rescue situation to apply. First, there had to be the possibility of saving human life or avoiding serious injury by rescuing the one in danger. Second, the situation had to be such that no course of action other than questioning the suspect would promise any relief from the situation. Here, the questions asked "were the only available means of obtaining information necessary for the provision of adequate medical services to a seriously injured person. As long as the victim remained unlocated and unattended, his life potentially hung in the balance." There was, therefore, no need to advise the suspect of his rights prior to asking where the victim was, and where the victim had been stabbed.

4. The police faced a similar problem in U.S. v. Mesa, 638 F.2d 582 (3d Circuit, 1980). An FBI hostage negotiator was trying to convince a suspect to surrender peacefully. The suspect had shot his wife, and was barricaded in a motel room, where he was believed to be holding hostages. Certain statements that the suspect made to the police were later used in evidence against him. The court held that Miranda warnings were not needed in such a situation. "Extending Miranda to this situation would put law enforcement officers to a delicate and difficult choice. When confronted with an armed, barricaded suspect who is possibly holding hostages, their attention would be diverted from what should be their primary purpose -- that of using the means most likely to convince the suspect to surrender peacefully without harming anyone in the

area." In such a situation, the Miranda warnings "would be counterproductive to creating the atmosphere of trust that is necessary to convince a suspect like Mesa to surrender peacefully." In fact, the giving of the warnings in such cases "could have disastrous effects on the suspect and perhaps on others in the vicinity."

5. In another case, the defendant and his accomplice had kidnapped someone. While the victim was confined at gunpoint by his accomplice, the defendant went to a ransom meeting at a shopping center. The defendant, as noted, left his accomplice guarding the victim. At the ransom meeting, the defendant pulled a gun and was immediately apprehended. At this point, the police knew that the victim's life was "in grave nature." If the defendant did not return shortly, the police were afraid that the victim would be killed by the accomplice. Faced with these facts, the police demanded that the defendant tell them where the victim was. He refused, at which time the police began "twisting his arm behind his back and choking him until he revealed where (the victim) was being held." The defendant was then taken to the police station and questioned by some other police officers. This questioning occurred about two hours after the incident at the shopping center. After being advised of his rights by these other officers, the suspect confessed.

6. On appeal, the court held that the coercive acts of the police at the shopping center had no causative effect on the suspect's later confession at the police station. The court did not consider whether his initial statement (regarding the victim's whereabouts) would have been admissible, as the government did not attempt to get this statement admitted into evidence. The court did, however, make the following statement regarding what the police had done:

"The force and threats asserted upon (the suspect) in the parking lot were understandably motivated by the immediate necessity to find the victim and save his life... The violence was not inflicted in order to secure a confession or provide other evidence to establish the defendant's guilt... the fact that any coercion was not applied to get a confession is highly significant." Leon v. State, 410 S.2d 201 (Fla. App, 1982).

7. On further appeal, the conviction was upheld. The federal court agreed that there was a break in the stream of events which served to dissipate (eliminate) the taint of the earlier confession regarding the victim's whereabouts: "The police, motivated by the immediate necessity of finding the victim and saving his life, used force and threats on Leon in the parking lot... the necessity of saving the victim's life, the different physical setting, the different group of questioning officers, and the meticulous explanation to appellant of his constitutional rights constituted a sufficient break in the stream of events to dissipate the effects" of the police officers' initial coercive actions. Leon v. Wainwright, 734 F.2d 770 (Eleventh Cir., 1984). The court noted that "the violence was not inflicted to obtain a confession or provide other evidence to establish appellant's guilt. Instead, it was motivated by the immediate necessity to find the victim and save his life." Even though the admissibility of this first

statement was not at issue (since the government had not offered it into evidence), the court had this to say:

"We do not by our decision sanction the use of force and coercion by police officers. Yet this case does not represent the typical case of unjustified force. We did not have an act of brutal law enforcement agents trying to obtain a confession in total disregard of the law. This was instead a group of concerned officers acting in a reasonable manner to obtain information they needed in order to protect another individual from bodily harm or death."

#### PART Q - THE EXCLUSIONARY RULE

1. General. A statement that has been obtained in violation of the applicable legal requirements "may not be received in evidence" (MRE 304a). The exclusionary rule "has traditionally barred from trial evidence obtained either during or as the direct result of an unlawful intrusion." It includes not just the confession that has been illegally obtained, but also any derivative evidence. "Derivative evidence" is that which has been discovered as a result of the illegally obtained evidence. Stated differently, the government may not exploit its illegal acts by using the illegally secured confession in order to obtain other evidence. U.S. v. Peurifoy, 48 CMR 34 (CMA, 1973).

a. What happens, then, is that we lose not only the confession itself, but also any evidence that has been derived from it (the product thereof). Suppose a suspect has been illegally interrogated, without any rights advisement, and he confesses. The confession itself, of course, will not be admissible in court. Suppose that in his confession, the suspect tells the police where he hid a one-pound bag of marijuana. Suppose further that the police then go and get the marijuana and send it to a lab for analysis. Suppose that the lab report comes back showing that the substance is, indeed, marijuana. The marijuana itself and the lab report are examples of "derivative evidence." Their existence is the product of the illegally obtained confession; thus, they derive their existence therefrom. A common term for such evidence is the "fruit of the poisoned tree." U.S. v. Leiffer, 10 MJ 639 (NCMR, 1980).

b. The derivative evidence may be evidence of a crime (murder weapon, knife, etc.), the identity of witnesses, contraband, etc. U.S. v. Van Hoose, 11 MJ 878 (AFCMR, 1981). The question is whether the government has acquired the evidence by exploiting, or taking advantage of, its earlier illegal activities. U.S. v. Kestelfoot, 2 MJ 706 (NCMR, 1978). As should be apparent, if we suppress the confession and the physical evidence that is derived from it, the entire government case may be drastically crippled, if not totally destroyed. U.S. v. Duckworth, 9 MJ 861 (ACMR, 1980).

2. Exceptions to the exclusionary rule. The purpose of the exclusionary rule is to deter or prevent unlawful police conduct. The courts reason that, if the evidence is not going to be admissible in court, the police will have no reason to act unlawfully. After all, the goal of the police is not to obtain

confessions that will be thrown out of court. Based on its purpose, however, the application of the exclusionary rule will depend on whether or not such would further the goal of deterring the police from breaking the law. Illinois v. Krull, 480 US 340, 94LEd2d 364, 107 SCT 1160 (1987).

a. One exception to the exclusionary rule occurs when the connection between the violation of the suspect's rights against self incrimination and the evidence acquired thereafter is attenuated or weak. This is the "attenuation of the taint" exception to the exclusionary rule. In U.S. v. Collier, 1 MJ 357 (CMA. 1976), the accused was a suspect in the murder of two people and the attempted murder of three others when he entered the emergency room of the base hospital and opened fire with a rifle. He was questioned on 24 June, the day of the offenses, without having been advised of his Article 31, UCMJ, and Miranda rights. The Court of Military Appeals held the OSI agents erroneously did not consider him to be a suspect prior to questioning him. Therefore, any further evidence acquired by the OSI based on the statement the accused made is presumed to be tainted and subject to the exclusionary rule, unless that taint has been attenuated or weakened. The next day OSI agents reinitiated an interrogation of the accused who had been released from their custody the day before. This time after the agents did a complete rights advisement, the accused voluntarily waived his rights. The agents did not mention the statement the accused made the day before, nor did they give any "cleansing" warning. During the subsequent interrogation, the accused admitted for the first time that he had purchased ammunition from the Base Exchange and that he owned a .22 caliber rifle. The agents asked him if he would give them the rifle so they could "eliminate" him as a suspect. He agreed. The agents accompanied him to his quarters on base. While they waited inside the quarters, the accused went by himself to a back bedroom where he picked up his loaded rifle. Then he gave this rifle to the agents. A ballistics examination of the rifle revealed it had been used to kill one of the victims. The issue at trial and on appeal was the admissibility of the accused's statements, the rifle, and the ballistics examination results. The Court of Military Appeals found that on 24 June the accused never mentioned the rifle during his unwarned, illegally obtained statement. Also, the accused testified at his trial that he was not "upset" about the statement taken on 24 June. Further, he testified he "voluntarily" talked about the rifle on 25 June. The Court held that the statement made on 25 June, the rifle the agents seized, and the ballistics examination done thereon were not the result of the agent's exploitation of the accused's illegally obtained statement of 24 June. Therefore, any taint created on 24 June was attenuated and weakened so that the 25 June statement, the rifle, and the test thereon were not the "fruits of the poisoned tree."

b. Another exception is when there is an independent source for the evidence. In other words, the evidence is not really the product of the unlawful confession. In U.S. v. Atkins, 46 CMR 244 (CMA, 1973), the accused had been improperly questioned without a rights advisement. His responses to this improper questioning were the direct cause of his subsequent apprehension. The apprehension and the search that incident thereto were found to be the direct result of the unlawful interrogation. Remember, "evidence obtained in violation of an accused's right to remain silent... is

excludable at trial. Similarly, other evidence obtained by exploitation of the illegally obtained evidence is inadmissible."

c. An example of the independent source exception would be where the government could show that the testimony of the witness really was not the product of prior illegal police activity. In other words, the witness's identity was not tainted because the government already knew it, PRIOR TO the unlawful interrogation by the police. U.S. v. Waller, 3 MJ 32 (CMA, 1977). The exclusionary rule, remember, excludes evidence that is the product or result of unlawful police activity. If the evidence does not fall into that category, the exclusionary rule does not apply. U.S. v. Boisvert, 1 MJ 918 (AFCMR, 1976). The exclusionary rule does not exclude evidence that has been obtained independently or apart from the illegal acts. U.S. v. Sowards, 5 MJ 864 (AFCMR, 1978).

d. To use another example, suppose during an illegal interrogation the suspect confesses. In his confession, he tells the police where he hid the money taken in a robbery. However, the police ALREADY KNEW the location of the money from an independent source, his roommate who seen him place the large amount of money in their room. While the suspect's illegally obtained confession is not admissible against him, can the police obtain a search authorization based NOT ON THE CONFESSION, but on the other, independently-obtained information? The answer is yes, "as long as the search authorization was based on an independent source of information... The evil which the exclusionary rule is guarding against is the use of illegally obtained information to support a search warrant." U.S. v. Moreno, 23 MJ 622 (AFCMR, 1986). The U.S. Supreme Court has similarly stated that "the exclusionary rule has no application where the government learned of the evidence from an independent source." Segura v. U.S., 468 US 796 82 L.Ed.2d 599 104 Sct 3380 (1984). MRE 304(b)3 states that evidence will be admissible if the court finds that it "was not obtained by use of the (illegally obtained) statement."

e. Another exception to the exclusionary rule is inevitable discovery. "The evidence would have been obtained even if the (illegally obtained) statement had not been made" (MRE 304(b)3). MRE 304(b)2 states: "Evidence that has been obtained as a result of an involuntary statement may be used when the evidence would have been obtained even if the involuntary statement had not been made." This is known as the "inevitable discovery" exception. The evidence will be admissible "where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence." U.S. v. Kozak, 12 MJ 389 (CMA, 1982). The government would have to show that when the illegal activity occurred, "the government's agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred."

f. In a case that reached the U.S. Supreme Court, a 10-year-old girl disappeared on Christmas Eve. The police began a massive search for the body, dividing the county into grids and using approximately 200 volunteers. While the search was in progress, the suspect was unlawfully interrogated, and he

confessed, taking the police to the body. At this point, of course, the rest of the search stopped. The court did not apply the exclusionary rule (to exclude the body), however, since it was inevitable that the body would have been discovered anyway, regardless of the suspect's confession. Had the search not been called off when the suspect confessed and took the police to the body, the police would have simply continued with the search, using the same grid system. They were, in fact, already approaching the area where the body was found. The instructions to those participating in the search were to look in all ditches, all culverts, all roads, all abandoned buildings, and "any other place where a small child could be secreted." The body was found in a ditch along that road. Nix v. Williams, 467 US 431, 81 L.Ed.2d 377 104 Sct 2501 (1984).

g. For the inevitable discovery exception to apply, the government must be able to show "that the evidence at issue would inevitably have been discovered by lawful means because of the information already in the government's possession, or leads actively being pursued by the government." U.S. v. Carruba, 19 MJ 896 (ACMR, 1985). The Carruba case involved a rather bizarre set of facts. The accused walked into the MP station and requested that someone take him to retrieve his car, which was parked off-post. The accused explained that he had been stopped off-post by the civilian police for driving under the influence of alcohol. He was apparently still intoxicated. Two military police officers agreed to take him to his car. During the ride to the car, the accused mentioned that he had a sawed-off shotgun and some marijuana in the car. One of the MP drove the accused's car back on-post, accompanied by the accused. When they got back to the MP station, the accused took a plastic bag of marijuana out of the glove compartment. The MP told him to put the bag away. The accused then went to the trunk and tried to open it. The MP opened the trunk for the accused, at which time the accused put the plastic bag into a back-pack. The accused then unfolded a towel in the trunk to reveal a sawed-off shotgun. He refolded the towel and shut the trunk. The accused was then apprehended and MPI was called. The MPI agent was told that the accused had said that he had "dope and a sawed-off shotgun" in the car. The accused at first would not consent to a search of the car, and told the MPI agent to go "get a search warrant."

h. The MPI agent went to get the authorization for the search of the car. As he was leaving, the accused changed his mind and consented to the search. When this happened, the MPI agent was called back before he had time to go and get the search authorization. On appeal, the court held that the accused's consent was invalid, due to his having been intoxicated. The evidence was still admissible, however, since the MPI agent "had sufficient probable cause to obtain a search authorization, and was actively pursuing evidence that would have inevitably led to the discovery of the evidence." He was on his way to get the search authorization when the accused consented. Consequently, the consent "did no more than hasten the inevitable discovery of the contraband." Had the accused not consented, the MPI agent would have simply obtained the search authorization and inevitably and lawfully discovered the evidence.

i. There is another exception to the exclusionary rule, called the "good faith exception." It applies in the case of a search or seizure that "resulted from an authorization to search, seize, or apprehend issued by an individual competent to issue the authorization... or from a search warrant or arrest warrant issued by competent authority." For it to apply, the individual issuing the authorization or warrant must have a "substantial basis for determining the existence of probable cause" and the police who execute the authorization or warrant must have "reasonably and with good faith relied on the issuance of the authorization or warrant" (MRE 311(b)3). This exception, then, deals with search and seizure problems. It is, then, very limited in its application. It is aimed at "technical deficiencies as to the establishment of probable cause for the search authorization." U.S. v. Queen, 20 MJ 817 (NMCMR, 1985). If you violate the requirements of Article 31 or Miranda, this good faith exception will not save the resulting confession. Again, remember that it only applies in the situations noted above.

3. The problem of successive statements. Assume that you have violated Article 31/Miranda, and have obtained a confession that is going to be inadmissible in court. Is there any way you can cure this defect and obtain a second statement that WILL be admissible? If so, how? The basic problem in such a situation is that the unlawfully obtained confession may have tainted, or contaminated, any subsequent statement that the suspect may make. U.S. v. Ravenel, 26 MJ 344 (CMA, 1988). In other words, "if the government obtains admissions illegally, and they are of a nature likely to produce a subsequent confession, a strong showing that a subsequent warning severed the presumptive influence must be made to permit use of the confession. Furthermore, absent any showing that the accused knew or had been informed that his prior admissions could not be used against him, the fact that he was advised of his rights prior to the execution of his (second) confession would normally not avoid (exclusion)." U.S. v. Bennett, 21 CMR 223 (CMA, 1956).

a. A confession, then, is inadmissible if it is "tainted by an earlier, inadmissible statement." The issue is whether the later confession had been produced by the first. If so, BOTH are inadmissible. The government, then, must make a "strong showing of severance from the presumptive influence of the earlier confession... a mere repetition of the warning necessitated by... Article 31 is normally insufficient to avoid the inadmissibility of the later statements." The government must go further, and "must strongly demonstrate that the later admissions and confessions were not the product of the earlier, inadmissible declaration." It is, indeed, a "heavy burden." U.S. v. Powell, 32 CMR 365 (CMA, 1962).

b. "Whether the influence of the first confession taints a later confession is basically a question of fact that depends for its determination upon consideration of all of the relevant circumstances." In other words, did the suspect make the second statement because he was afraid that "the cat was already out of the bag" and could not be rebagged? If so, then the second statement has been made under the influence of the first, and both are inadmissible. U.S. v. Caliendo, 32 CMR 405 (CMA, 1962). The problem, then, is that there is a "presumptive influence" of the first statement upon the making of the second one. The government's job, then, is to somehow overcome

this presumed taint. U.S. v. Pyatt, 46 CMR 84 (CMA, 1972). Stated differently, an "illegally obtained statement... presumptively influences" a later statement "and renders it likewise inadmissible." U.S. v. Collier, 49 CMR 719 (AFCMR, 1973). Some of the relevant factors in determining whether this presumptive taint has been removed are the following:

"...the time interval between the interrogation sessions; whether the accused acknowledged his prior admissions exerted no influence on his decision to subsequently confess; whether the confession was obtained by the same interrogator who obtained the prior inadmissible statement; whether the interrogator relied upon the prior admissions in his effort to gain a confession, or conversely, clearly made the accused understand the prior admissions could not be used against him; the accused's mental status and emotional condition; the nature and degree of the improper influence; and of course the thoroughness and correctness of the warning given preceding the confession." U.S. v. Weston, 1 MJ 789 (AFCMR, 1976).

c. In Weston, the suspect was not told that his earlier statement could not be used against him, something which the court termed "an important factor" and "the preferable procedure." The suspect knew that the investigator who took the first (inadmissible) statement had talked with the agent who took the second statement, PRIOR TO the taking of the second statement. As the court explained, "it is reasonable to assume the accused was quite aware his freshly provided admission of guilt was the subject of that conversation." Although the suspect had been advised of his Article 31 rights prior to the second interview, this was not enough. The court was not convinced that the rights advisement, by itself, severed the "presumptive influence" of the first statement. The second statement, then, was also inadmissible.

d. Regarding the relevant considerations, "only the strongest combination... would be sufficient to overcome the presumptive taint which attaches once the government improperly has secured incriminating statements... In addition to rewarning the accused, the preferable course in seeking an additional statement would include advice that prior illegal admissions or other improperly obtained evidence which incriminated the accused cannot be used against him." The courts will look to see if the second statement was "insulated from the effect of all that went before... was there a break in the stream of events sufficient to conclude that the giving of the final statement was uninfluenced by the events which had preceded it?" U.S. v. Seay, 1 MJ 201 (CMA, 1975). In Seay, the court noted that other relevant factors included the length of time between the two statements, and whether the same interrogator took both statements.

e. A good illustration of the problem is U.S. v. Nargi, 2 MJ 96 (CMA, 1977). The first statement was taken without a proper Article 31 warning. Before the second statement was taken, the questioner told the suspect "to disregard or forget what had occurred at the counseling session, as he did not want to take that into consideration in his present questioning." The court held that the government "has failed in its burden of demonstrating that the

earlier illegal interrogation has been overcome... Clearly the two statements are closely related in time, and the only reason that the appellant was interrogated by the CID was because of the matter he divulged in his first statement." There was no evidence that the suspect ever acknowledged that his first statement had not influenced his decision to again incriminate himself with a second statement. On the contrary, the questioner had reminded him of the earlier statement, "immediately prior to" the taking of the first statement:

"The agent's comment to the appellant that he did not want to use this earlier admission during the on-going interrogation falls far short of properly informing the appellant that his first admission could not be used against him, and that he should not feel compelled to speak as a result of having already 'let the cat out of the bag by confessing'... The conclusion is inescapable that these two statements were so interrelated that exclusion of the first compels exclusion of the second."

f. The presumptive taint may be overcome by showing that the second confession was not induced by the first. In one case, the government showed that the second questioner did not know of the first statement, and did not refer to it, or rely upon it in taking the later statement. Also, the suspect stated that he made the second statement because he wanted to "get the matter off his chest" and "tell the police what had occurred." This was enough to show a break between the two statements. U.S. v. Ricks, 2 MJ 99 (CMA, 1977). The mere passage of time was not enough to do so in U.S. v. Terrell, 5 MJ 726 (ACMR, 1978). This is, of course, a relevant factor as is whether the same interrogator is taking both statements. A lapse of nine days was insufficient, however, where the suspect's "awareness of the criticality of his earlier confession had not been dissipated," Here, prior to the second questioning, the second questioner had spoken to the agent who took the first statement. Not only that, but the suspect knew this. He, therefore, knew that the second questioner was aware of his earlier confession. The court found this to be of "startling impact" and held that the second questioner was not insulated from the first one. The second questioner knew of the earlier confession, and relied upon it in taking the second confession. Based on these facts, the court concluded:

"The objective evidence of appellant's subjective thoughts on the occasion of his second confession leads us to conclude that the fact and influence of his earlier confession had not been expunged... The taint of the illegal confession had not been attenuated at the time of the taking of the (second) confession."

g. In another case, the investigator who took the first statement was present when the second statement was taken. The accused explained why he made the second statement: "Well, I figured, you know, I had already told him what had happened, so if they wanted a statement, they could get it from him... they had everything they needed." Under these facts, the court ruled that "the conclusion is inescapable that the (first) inadmissible statement... led directly to the second statement, thereby tainting it and

requiring its exclusion from evidence." U.S. v. Johnson, 6 MJ 716 (AFCMR, 1978). The issue, again, is whether the second confession is "derived from illegal government activity." U.S. v. Butner, 15 MJ 139 (CMA, 1983).

h. In U.S. v. Angevine, 16 MJ 519 (ACMR, 1985), the government followed the "preferable course" of advising the suspect that his earlier statement was inadmissible against him; i.e., a "cleansing statement" was used. This is also sometimes referred to as a "curative warning." Other relevant factors, according to the court, were the time lapse, the change of investigators, and the different locations of the two interviews. Remember, the earlier violation raises a presumption that the subsequent statement is tainted and is, likewise, inadmissible. U.S. v. Kruempelman, 21 MJ 225 (ACMR, 1985).

#### PART R - LINE-UPS

1. General - the right to counsel. A line-up is regarded as unreliable if it "is so suggestive as to create a substantial likelihood of misidentification" (MRE 321(b)(2)A). A suspect in the military has a right to counsel at a line-up, but only if the line-up is conducted "after preferral of charges or imposition of pretrial restraint... for the offense under investigation" (MRE 321(b)(2)A). If the suspect requests counsel (assuming he is entitled to such), an attorney "shall be provided... before the line-up may proceed." The suspect may waive this right, if such waiver is "freely, knowingly, and intelligently made."

a. This limited right to counsel at a line-up should not be confused with Article 31/Miranda rights. As we previously saw, compelling a suspect to appear in a line-up does not involve "testimonial communication." The Fifth Amendment protects an accused's "communications," and not compulsion "which makes a suspect or accused the source of real or physical evidence." Such things as fingerprints, photography, etc., are not "testimonial." The right to counsel at a line-up is due to the fact that, under the conditions noted above, the line-up is considered to be a critical stage of the proceedings against the accused. The right to counsel at a line-up, then, comes from his Sixth Amendment right to effective assistance of counsel at all critical stages of the criminal proceeding.

b. The attorney's presence "does not invest him with any authority to prevent, interfere with, or control the line-up procedure. He may offer suggestions to the individual in charge of the line-up, but that individual is not required to acquiesce in the desires or demands of counsel for the suspect." The attorney acts as an observer "to assure that the suspect's interests will be protected." U.S. v. Webster, 40 CMR 627 (ABR, 1968).

2. Photographic line-ups. There is no right to counsel here. The accused himself has no right to be present. The reason is that "no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary." In the case of photographs, the defense can later reconstruct what occurred. There is no more right to counsel here than there is when the prosecutor is questioning witnesses in his office. U.S. v. Ash, 413 US 300, 37 L.Ed.2d 619, 93 S.Ct 2568 (1973). The

right to the presence of counsel "applies only to corporeal (physical), not photographic, exhibitions of an accused to witnesses." U.S. v. Smith, 44 CMR 904 (ACMR, 1971). This is also true in the case of "an unintentional exposure... a situation in which the accused is inadvertently and unintentionally exposed to witnesses." U.S. v. Young, 44 CMR 670 (AFCMR, 1971).

3. The due process standard. As was noted earlier, the line-up must not be "so suggestive as to create a substantial likelihood of misidentification" (MRE 321(b)1). In other words, it must not be unfair. In U.S. v. Wade, 388 US 218, 18 L.Ed.2d 1149, 87 Sct 1926 (1967), the Supreme Court noted the potential problems with eyewitness testimony, and the dangers of unreliable, suggestive identification procedures. There are, then, "hazards of serious unfairness" and "grave potential for prejudice."

a. What, then, makes a line-up unfair? And, if it is unfair, when has it given rise to a "substantial likelihood of misidentification?" Possibilities for making a line-up unfair include such things as suggestive statements by the police, and having the suspect clearly stand out from among the others in the line-up. In one case, for example, the suspect was 6 feet tall, while the others in the line-up were only about 5-1/2 feet tall. Also, the suspect was wearing a Jacket similar to the one worn by the robber. This was deemed unfair, since the suspect 'stood out from the (others) by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber." Such a procedure "made it all but inevitable" that the suspect would be picked out. Such a procedure, then, "so undermined the reliability of the eyewitness identification as to violate due process." This was equated to telling the witness that one of the subjects in the line-up was "the man." Foster v. California, 394 US 440, 22 L.Ed.2d 402, 89 Sct 1127 (1969). A one-person line-up has similarly been condemned. Biggers v. Tennessee, 390 US 404, 19 L.Ed.2d 1267, 88 Sct 979 (1968), U.S. v. Evans, 27 MJ 34 (CMA, 1988).

b. Note that the same factors of suggestiveness (unfairness) can also make a photograph line-up improper. Was the suspect's photo larger than the others? Was his the only mug shot in the group? Was his the only one in color? Did his somehow stand out from among the others? Did the police make suggestive statements to the witness? An "improper use of photographs by police may sometimes cause witnesses to err in identifying criminals." Again, the standard is the same: was the photographic identification process "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification?" Simmons v. U.S., 390 US 377, 19 L.Ed.2d 1247, 88 Sct 967 (1968).

c. Showing a suspect singly to the victim "is pregnant with prejudice... When the suspect is shown singly, havoc is more likely be played with the best-intended recollections." Biggers v. Tennessee, 390 US 404, 19 L.Ed.2d 1267, 88 Sct 979 (1968). The one-person line-up, or show-up, may be permissible, if dictated by the circumstances. In one case, a one-person confrontation occurred in a hospital room, where the victim was in danger of death. To have delayed the line-up could have proven fatal. The "need for

immediate action" was apparent here, and could have served to exonerate the suspect as well. It was "the only feasible procedure," as the police could not take the victim to the jail. The usual line-up procedures, then, were simply out of the question. Stovall v. Denno, 388 US 293, 18 L.Ed.2d 1199, 87 Sct 1967 (1967).

d. If the line-up is found to have been impermissibly suggestive, the issue then becomes "whether, considering the totality of (the) surrounding circumstances, there is a very substantial likelihood of irreparable misidentification." It will be the government's burden to show "that there was a source for an in-court identification independent of the line-up." Relevant factors in determining "the likelihood of an irreparable misidentification" include such things as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. U.S. v. Quick, 3 MJ 70 (CMA, 1970).

e. The issue, then, is "whether an illegal line-up would taint an in-court identification," as opposed to there being an independent source for the witness' later in-court identification of the accused. In U.S. v. Fors, 10 MJ 367 (CMA, 1981), the court identified some additional relevant factors, to include "the existence of any discrepancy between any pre-lineup description and the defendant's actual description," any identification by the witness of another person, prior to the line-up in question, and "the failure to identify the defendant on prior occasion." The court will look at all of the relevant factors in determining whether there was "a source of the in-court identification independent of the illegal line-up." When there has been an unlawful impermissibly suggestive line-up, it is the government's burden "to establish by clear and convincing evidence that (the) in-court identification testimony was based on observations of the suspect other than those stemming from the illegal line-up."

f. Conducting an unlawful line-up, then, is very risky. When the procedure has been impermissibly suggestive, the "central question" will be whether the witness's in-court identification of the accused is the product thereof. Neil v. Biggers, 409 U.S. 186, 34 LEd2d 401, 93 Sct 375 (1972). If the government cannot satisfy this burden, the witness may be prevented from identifying the accused in court. The result, then, may be disastrous for the government's case.

g. If reasonable precautions are taken in arranging the line-up, the problems noted above will not occur. A good guide is the standard found in CIDR 195-1. It states, for example, that there should be six or more participants in the line-up, all of whom should be reasonably similar in appearance. Similar standards are set forth for conducting photographic identification procedures.

## PART S - CONCLUSION

The Fifth Amendment's privilege against compelled self-incrimination is an extremely important right of a person suspected of a crime. Confessions which are obtained through coercion and unlawful inducements are simply not reliable. The laws are not intended to frustrate the legitimate concerns of law enforcement. The purpose is to accommodate BOTH the need for effective enforcement of our laws, as well as the equally important rights of the criminal defendant. The police officer who understands the basic laws which govern this area will not be thwarted in the accomplishment of his job. As is also true in the area of the Fourth Amendment (the law of search and seizure), the difficulty is in attaining a balance between those two needs. It is the frequently voiced debate concerning "the rights of the state versus the rights of the individual." The point that must be made is that there need be no confrontation between the two interests at stake here; indeed, there cannot be. Those who question persons suspected of criminal offenses must understand the need to preserve the balance between these two interests. If our law enforcement officials understand the issues that are involved here, maintain the necessary perspective, and act reasonably and with good faith, they will find the courts are not their enemy.

## PRACTICE EXERCISE

The following exercises are multiple choice. You are to select the one correct choice by CIRCLING the letter beside it directly on the page. This is a self-graded lesson exercise. DO NOT look up the correct answer from the solution sheet until you have finished. To do so will endanger your ability to learn this material. Also, your final examination score will tend to be lower than if you had not followed these recommendations.

1. The constitutional protection against compelled self-incrimination is found in:
  - A. the First Amendment.
  - B. the Fourth Amendment.
  - C. the Fifth Amendment.
  - D. the Sixth Amendment.
2. The military equivalent of the privilege against compelled self-incrimination is contained in:
  - A. Article 15, UCMJ.
  - B. Article 31, UCMJ.
  - C. Article 32, UCMJ.
  - D. Article 39A, UCMJ.
3. Which of the following is a form of interrogation?
  - A. Asking a suspect to provide a hair sample.
  - B. Asking a suspect to provide a handwriting sample.
  - C. Asking a suspect to appear in a line-up.
  - D. All of the above.
  - E. None of the above.
4. In the military, the right to counsel comes from:
  - A. the Supreme Court's Miranda decision.
  - B. Article 39A, UCMJ.
  - C. Article 139, UCMJ.
  - D. the Fourth Amendment to the U.S. Constitution.
5. "Custodial interrogation" may be found to exist:
  - A. only when the suspect is under apprehension.
  - B. only when the suspect is under either arrest or apprehension.
  - C. when a person has been deprived of his freedom of action in any significant way.
  - D. only after the suspect has been informed of his rights.

6. A spontaneous statement is:
- A. admissible, but only if reduced to writing.
  - B. admissible, but only if under oath.
  - C. admissible, but only if the suspect has first been advised of his rights under Article 31.
  - D. none of the above.
7. If a suspect is making a spontaneous statement:
- A. he must be interrupted and advised of his rights to an attorney.
  - B. he must be interrupted and advised of his rights under Article 31, UCMJ.
  - C. the statement will be admissible in court.
  - D. the statement will be admissible at an administrative proceeding, but not at a court-martial.
8. When a suspect says he wants an attorney:
- A. the interrogator must not question him again for at least two hours.
  - B. the questioning must cease immediately.
  - C. the suspect can only be questioned further if it is done by a different questioner.
  - D. the suspect may be encouraged to change his mind.
9. If a suspect is questioned without a prior advisement of his rights:
- A. the confession that he makes is not admissible in court.
  - B. his confession will be admissible, but only if it is made under oath.
  - C. his confession is admissible, but only if there are two independent witnesses.
  - D. the confession will be admissible, but only under the "mere felony rule."
10. If a suspect has been properly advised of his rights:
- A. any confession that he makes must still be found to be voluntary.
  - B. his resulting confession will be admissible, regardless of the circumstances of the interrogation.
  - C. his confession will be admissible, but only if it is in writing.
  - D. none of the above.

11. Police deception in obtaining a confession:
- A. is unlawful.
  - B. renders any subsequent confession inadmissible.
  - C. both of the above.
  - D. none of the above.
12. Which of the following is a recognized exception to the exclusionary rule?
- A. The exigency rule.
  - B. The probable cause rule.
  - C. The inevitable discovery rule.
  - D. All of the above.
13. If the police obtain a confession in violation of a suspect's rights:
- A. this has no effect on later statements.
  - B. this is presumed to taint any later statements.
  - C. this is presumed to taint any subsequent ORAL statements, but not written ones.
  - D. none of the above.
14. A suspect has a right to counsel at a line-up:
- A. if he is suspected of a crime.
  - B. only if he is suspected of a felony.
  - C. only if the line-up is conducted at the police station.
  - D. if charges have been preferred against him.
15. At a photographic identification procedure:
- A. there is no right to counsel.
  - B. there is a right to counsel, but only if the procedure is conducted subsequent to the suspect's apprehension.
  - C. there is a right to counsel, but only if the procedure is conducted after the suspect has been placed under pretrial restraint.
  - D. none of the above.
16. A suspect's waiver of his rights:
- A. must be in writing.
  - B. must be voluntarily and knowingly made.
  - C. must be witnessed by at least two police officers.
  - D. all of the above.

17. Interrogation may include:
- A. express questioning of the suspect.
  - B. words spoken to the suspect.
  - C. actions.
  - D. all of the above.
18. Which of the following are examples of "official" questioning?
- A. A CID agent questioning a suspect.
  - B. The company commander questioning a suspect.
  - C. The platoon leader questioning a suspect.
  - D. The first sergeant questioning a suspect.
  - E. All of the above.
19. Advising a suspect of his rights from memory:
- A. is illegal.
  - B. is the preferred practice.
  - C. is legal but risky.
  - D. is legal, but you will not be allowed to testify in court that you have done so.

# PRACTICE EXERCISE

## ANSWER KEY AND FEEDBACK

<u>Item</u>	<u>Correct Answer and Feedback</u>
1.	C. the Fifth Amendment. the Fifth Amendment... (p. 1-3, para 1).
2.	B. Article 31, UCMJ. Article 31, UCMJ... (p. 1-3, para 1).
3.	E. None of the above. The Meaning of... (p. 1-11, Part F).
4.	A. the Supreme Court's Miranda decision. As we have seen... (p. 1-25, para 1).
5.	C. when a person has been deprived... Still, however, he... (p. 1-28, para 2a).
6.	D. none of the above. Spontaneous Statements... (p. 1-39, Part K).
7.	C. the statement will be admissible in court. Spontaneous Statements... (Part K, p. 1-39).
8.	B. the questioning must cease immediately "When an accused... (p. 1-42, para 1a).
9.	A. the confession that he makes is not... The exclusionary rule... (Part Q, p. 1-69).
10.	A. any confession that he makes must... General. Even if a suspect... (p. 1-60, para 1).
11.	D. none of the above. The use of deception... (p. 1-66, para 4).
12.	C. The inevitable discovery rule. Another exception to the... (p. 1-71, para e).
13.	B. this is presumed to taint any later statements. The basic problem... (p. 1-73, para 3).
14.	D. if charges have been preferred against him. A suspect in the military... (p. 1-76, para 1).
15.	A. there is no right to counsel. Photographic line-ups (p. 1-76, para 2).

- 16. B. must be voluntarily and knowingly made.  
Waiver of Rights (p. 1-37, para 7 and 8).
- 17. D. all of the above.  
The Meaning of Interrogation (p. 1-11, Part F).
- 18. E. All of the above.  
The Concept of "Official Questioning" (Part H, p. 1-21).
- 19. C. is legal but risky.  
There is no need for you... (p. 1-34, para 3).